

**TRAFFICKING IN HUMAN BEINGS FOR FORCED LABOUR IN
DOMESTIC AND INTERNATIONAL LAW: A COMPARATIVE
LEGAL STUDY OF THE KINGDOM OF SAUDI ARABIA AND
THE UNITED KINGDOM**



**Abertay
University**

**A Thesis Submitted to the University of Abertay in Partial Fulfilment of the
Requirements for the Degree of Doctor of Philosophy in Criminal Law**

By

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

(In The Name of Allah Most Gracious Most Merciful)

يَا أَيُّهَا النَّاسُ إِنَّا خَلَقْنَاكُمْ مِنْ ذَكَرٍ وَأُنْثَىٰ وَجَعَلْنَاكُمْ شُعُوبًا وَقَبَائِلَ لِتَعَارَفُوا إِنَّ أَكْرَمَكُمْ
عِنْدَ اللَّهِ أَتْقَاكُمْ إِنَّ اللَّهَ عَلِيمٌ خَبِيرٌ ﴿١٣﴾

O mankind! We have created you from a male and a female, and made you into nations and tribes, that you may know one another. Verily, the most honourable of you with Allah is that (believer) who has At-Taqlwa. Verily, Allah is All-Knowing, All-Aware¹

The Prophet Mohammed (PBUH) said:

Allah says, 'I will be against three persons on the Day of Resurrection: The first one who makes a covenant in My Name, but he proves treacherous. The second one who sells a free person (as a slave) and eats the price. And the third one who employs a labourer and gets the full work done by him but does not pay him his wages.'²

¹ Surah Hujurat (The Dwellings), ayah 13.

² Narrated Abu Huraira No: 2075.

DECLARATION

Candidate's declarations:

I hereby certify that this thesis submitted in partial fulfilment of the requirements for the award of Doctor of Philosophy in Abertay University, is wholly my own work unless otherwise referenced or acknowledged. This work has not been submitted for any other qualification at any other academic institution.

Signed [candidates signature].....

Date.....

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OMAR Ali MIREI

ABSTRACT

This thesis examines the effect of combating of human trafficking as a crime. Special emphasis has been placed on forced labour and the rights of trafficked victims and their protection. The study explores various legislations undertaken at regional, national and international levels and considers rights of trafficked victims under international human rights and Islamic rights. The aim of the thesis is to provide a critical and comparative analysis of the legal systems of the Kingdom of Saudi Arabia (KSA) and the United Kingdom (UK) in terms of human trafficking.

The thesis consists of eight chapter; each covering a different aspect of the study. It begins by providing background information regarding the issue of human trafficking and proceeds to examine developments of legal frameworks across the two jurisdictions to combat this crime and penalize the criminals. It seeks to examine the legal system pertaining to human trafficking for forced labour and analyse the three distinct platforms, that is, prevention, protection, and punishment, by comparing the legal systems of the KSA and the UK.

The examination of both countries aims to identify the strength and weaknesses of the KSA system as compared to the UK system. Thus, it concludes that the KSA can improve its ranking from Tier 2 watch list to Tier 1 if reforms are introduced in the legislation and enforcement domains. The study also demonstrates how the UK and the KSA portray 'human trafficking' in their regional laws. A problem often faced during the information-gathering and investigation stages is the lack of available evidence against traffickers, a particular issue in the KSA.

The thesis concludes that the transnational aspect of this phenomenon makes it necessary to establish a thorough and comprehensive legal framework to cover all matters pertaining to this crime, including the protection of victims and punishment of criminals in the KSA and the UK, including immigration and '*kafala*' strategies that may be of value in future researches.

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Title

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Qualification: Doctor of Philosophy in Criminal Law

Date of 2015/2016

Submission:

I agree that a copy may be made of the whole or any part of the above-mentioned project report without further reference to the undersigned.

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LIST OF ABBREVIATIONS

ACHR	Arab Charter of Human Rights
SAMA	Arabian Monetary Agency
ACPO	Association of Chief Police Officers
AIA	Asylum and Immigration Act 1996
AML	Anti-Money Laundering
ATMG	Anti-Trafficking Monitoring Group
AWB	Agricultural Wages Board
BCIA	Border, Citizenship and Immigration Act 2009
BLG	Basic Law of Governance 1991
CA	Competent authority
CATW	Coalition against Trafficking in Women
CDHRI	The Cairo Declaration on Human Rights in Islam
CEOP	Child Exploitation and Online Protection
COE	Council of Europe
COEU	Council of the European Union
CJA	Coroners and Justice Act 2009
CJIA	Criminal Justice and Immigration 2008
CPS	Crown Prosecution Service
CRC	Convention on the Rights of the Child 1989
E&W	England and Wels
EEA	European Economic Area
EC	European Community
ECA	European Communities Act 1972
ECG	English Constitution Group
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
ECPAT	End Child Prostitution and Trafficking

EDAW	Convention on the Elimination of All Forms of Discrimination against Women 1979
EP	European Parliament
EU	European Union
FATF	Financial Action Task Force
FBI	Federal Bureau of Investigation
FIU	Financial Intelligence Unit
GAATW	Global Alliance Against the Trafficking of Women
GCC	Gulf Co-operation Council
GLA	Gangmasters Licensing Authority
GNI	Gross National Income
GRETA	Group of Experts on Action against Trafficking in Human Beings
HRW	Human Rights Watch
IA	Immigration Act
IANA	The Immigration, Asylum and Nationality Act (2006)
ICAR	Information Centre about Asylum and Refugees
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
ICMPD	International Centre for Migration Policy Development
ICTY	International Criminal Tribunal for the former Yugoslavia
IDMG	Inter-Departmental Ministerial Group on Human Trafficking
IHRN	International Human Rights Network
ILC	International Labour Conference
ILO	International Labour Organisation
ILO AFL	International Labour Organisation Abolition of Forced Labour Convention 1957
ILO FL	International Labour Organisation Forced Labour Convention 1930
IND	Immigration and Nationality Directorate
IOM	International Organisation for Migration
JCHR	Joint Committee on Human Rights

JHA	Justice and Home Affairs
KSA	Kingdom of Saudi Arabia
LAS	League of Arab States
LJ	Lord Justice
LN	League of Nations
MDWs	Migrant Domestic Workers
MHWA	Migrant Help and Women's Aid
ML	Money Laundering
MOL	Ministry of Labour
NCA	National Crime Agency
NCCTP	National Committee to Combat Crimes of Trafficking in Persons of the KSA
NCIS	National Criminal Intelligence Service
NCS	National Crime Squad
NGOs	Non-Governmental Organisations
NI	Northern Ireland
NIAA	Nationality, Immigration, and Asylum Act 2002
NRM	National Referral Mechanism
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organisation for Security and Cooperation in Europe
PBUH	Peace Be Upon Him
PJ	Police Journal
PJCCM	Police and Judicial Cooperation in Criminal Matters
PSNI	Police Service of Northern Ireland
SAWS	Seasonal Agricultural Workers Scheme
SOCA	Serious Organised Crime Agency
TARA	Trafficking Awareness Raising Alliance
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
THB	Trafficking in Human Beings

TIP	Trafficking in Persons
TOC	Transnational Organized Crime
UDHR	Universal Declaration of Human Rights 1948
UK	United Kingdom
UKBA	United Kingdom Border Agency
UKHTC	United Kingdom Human Trafficking Centre
UKVI	UK Visas and Immigration
UN	United Nations
UN TOC	United Nations Convention against Transnational Organized Crime 2000
UNCHR	United Nations Commissioner for Human Rights
UNESA	United Nations Economic and Social Affairs
UNODC	United Nations Office on Drugs and Crime
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
UNHRC	United Nations on Human Rights Committee
UNICEF	United Nations Children's Fund
US	United States
USAID	United States Agency for International Development
VDPA	Vienna Declaration and Programme of Action

LIST OF FOREIGN WORDS/PHRASES

Latin phrases	Meaning
<i>actus reus</i>	Latin term used to describe a criminal act
<i>Asl</i>	evidence in the Islamic jurisprudence
<i>de facto</i>	in fact
<i>de jure</i>	lawful
<i>Diya</i>	monetary reimbursement paid to the victim (blood money)
<i>dolus specialis</i>	specific intent
<i>erga omnes</i>	Latin phrase which means towards everyone which applies as against every one
<i>Fard or Wajub</i>	compulsory actions such as saying the five prayers or observing fasts during Ramadan
<i>Fatwa</i>	a ruling on a point of Islamic law given by a recognized authority
<i>Fiqh</i>	Islamic jurisprudence
<i>Halal</i>	permissible
<i>Hawaladars</i>	an informal system for transferring money
<i>Hudud</i>	the class of punishments in Islam
<i>Ibadat</i>	devotional obligations in Islamic Sharia law
<i>Ijma</i>	consensus
<i>Ijtihad</i>	the analysis and interpretation of Islamic laws to pass official judgments

<i>Illah</i>	the description that affecting in the rule
<i>inter alia</i>	among other things
<i>inter se</i>	among themselves or between
<i>jus cogens</i>	the principles which form the norms of international law that cannot be set aside
<i>Kafala</i>	sponsorship system
<i>Kafeel</i>	sponsor
<i>Makruh</i>	actions that are disliked but are not sinful, and therefore are not liable to punishment
<i>mens rea</i>	Latin term used to describe a criminal purpose
<i>Qisas</i>	revenge crimes restitution 'eye for an eye'
<i>Qiyas</i>	reasoning
<i>Riba</i>	interest
<i>Sharia</i>	Islamic law
<i>Sunnah</i>	The way of Prophet Mohammed (PBUH) based on words and acts
<i>Ta'zir</i>	the alternative punishments in Islamic Sharia law
<i>Yakini</i>	confirmed

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R v Atchara Nualpenyai [2010] EWCA Crim 692

R v Besmir Ramaj and Hasan Atesogullari [2006] EWCA Crim 448

R v Lorenc Roci and Vullnet Ismailaj [2005] EWCA Crim 3404

R v Massey [2007] EWCA Crim 2665

R v Ramaj and Atesogullari [2006] EWCA Crim 448

R v Shaban Maka [2006] EWCA Crim 3365

R v SK [2011] EWCA Crim 1691

Secretary of State for the Home Department v Lyudmila Dzhygun (Immigration Appeals Tribunal) App no CC-50627-99 (13 April 2000)

CHAPTER 1: INTRODUCTION TO THE STUDY

1.1 INTRODUCTION

This study takes a look at legal responses, generally at a regional level, against crimes of human trafficking for purposes of forced labour in the international community, and shows in contrast the difference between legislation of the Kingdom of Saudi Arabia (KSA) and the United Kingdom (UK). A variety of terms and issues need to be considered for this topic. In the absence of a definition, human trafficking is understood simply either as a problem of migration, of forced labour, or of the law itself. Once clarity is brought to the definition of human trafficking, the next issue which needs to be addressed is countering human trafficking. One of the concerns over measures taken to counter human trafficking is, in the context of many states, the state's reluctance to help the trafficked victims, as their legal status is unclear within the laws of many states, because of the lack of coherence between these separate issues. Further confusion is created because of excessive usage of the terms 'illegal', 'irregular' and 'undocumented' in reference to smuggling of migrants and human trafficking across all migration cases. These terms do not always mean the same thing, and are not always used consistently. In the offence of human trafficking, it is still unclear how to establish, to the satisfaction of a court of law, the *mens rea* requirement in order to combat the intention of labour exploitation. In addition, combating human trafficking, and the implementation of best practices at all levels of the law-making process is complicated due to the above lack of understanding coupled with inadequate training.

Under the current approach, the major challenge is to create clarity of understanding in order to address to the aforementioned problems and to enhance the legal process while offering protection measures to victims of trafficking. In this part, the study's background is examined, which includes the aims and objectives along with its scope of the study.

The research and methodology for this piece of research sets out questions concerning the unresolved issues, with the intention of leading to a more developed framework to counter human trafficking in practice, at both national and international levels, in the legislation of the KSA.

1.2 HISTORICAL BACKGROUND TO THE STUDY

Slave trading has been around since the times of the ancient civilizations that bordered the Mediterranean Sea and the Middle East and grew excessively during the Roman period. Consequently, the habit of keeping slaves was taken up by the whole of Europe, later spreading to North America when Europeans came to the American continent.¹ Owners or so-called 'masters' traded slaves as their own property.² Conventionally, they were kept as guards, cooks or domestic servants, for sexual purposes or forced labour, as labourers for agriculture and later as labours in the manufacturing industries.³ Under Roman law, slaves were treated as property and it was within rights of an owner to exchange slaves with others in a similar way to livestock or possessions.⁴ Furthermore, slaves were widespread, from fields to shops to workshops and even in offices.⁵ Slavery was viewed as a classical Roman institution in which one man governed another,⁶ and slaves were offered no platform to talk about the harsh environment in which they lived.⁷

The slave trade declined after the fall of the Roman Empire for several reasons. After the introduction of Christianity, some slaves were allowed freedom on moral grounds, others were released because it was becoming difficult to pay them, and some were

¹ William D Phillips, *Slavery from Roman Times to the Early Transatlantic Trade* (Manchester University Press 1985) 3, 16.

² Robin Blackburn, *The Making of New World Slavery: From the Baroque to the Modern, 1492-1800* (Verso 1997) 35.

³ Phillips (n 1) 24.

⁴ UNCHR, Fifty-Second Session, 'Contemporary Forms of Slavery: Updated Review of the Implementation of and Follow-up to the Conventions on Slavery by Mr David Weissbrodt and Anti-Slavery International' (26 May 2000) UN Doc E/CN.4/Sub.2/2000/3, para 18.

⁵ Marc Bloch, *Slavery and Serfdom in the Middle Ages* (William R Beer tr, University of California Press 1975) 1.

⁶ William Warwick Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (4th edn, CUP 2007) 62.

⁷ Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff 2006) 10.

able to conjure enough money to buy their own freedom.⁸ However, slavery persisted in successive eras and remained through the entire Byzantine Empire. A late Roman legal code was drawn up by Emperor Justinian that, essentially, decreed the legal rights of owners over their slaves as: 'Slaves are in the power of their masters; for we find that among all nations' slave owners has the power of life and death over their slaves, and whatever a slave earns belongs to his master'.⁹

Apart from this phenomenon's prevalence in Europe, it was also seen in the Islamic world where black-skinned slaves were known to be sold in North African and Middle Eastern slave markets.¹⁰ Most of the slaves from the Muslim Mediterranean side were used for domestic work. They shared the intimate life of the household and lived with the family in their home.¹¹ Islam advocated freedom from slavery as it was considered to be a great crime and therefore, as a reward, freedom was granted to those slaves that converted to Islam. Financially well-off Muslims were expected to guarantee the freedom of the slave by paying their masters so that slavery could be prohibited. This was expected to lead to a decrease in the practice of slavery and eventually its subsequent prohibition. Through this practice, Adam Metz, the German Orientalist, stated that emancipation was as a fundamental principle of Islam. According to him, Islam provided a benefit to the slaves by giving them the right to earn their freedom where they were unable to pay their way to freedom, along with the right to work independently.¹² Moreover, a commendable custom as per Islamic teachings was that it was recommended that before his death, an owner should grant freedom to his slaves.¹³ During the last third of the sixteenth century, the search for gold in Africa by the Portuguese was one of the major events of European history.¹⁴ From West Africa, the Portuguese captured twelve individuals for Prince Henry¹⁵ and hence became

⁸ Milton Meltzer, *Slavery: A World History*, vol I (Da Capo Press 1993) 183.

⁹ William Robert Barnard Brownlow, *Lectures on Slavery and Serfdom in Europe* (Negro Universities Press, Reprint 1969) 13.

¹⁰ John Hunwick, *The Religious Practices of Black Slaves in the Mediterranean Islamic World* (Markus Wiener 2004) 149.

¹¹ *ibid* 150.

¹² Adam Metz, *Islamic Civilization in the Fourth Century AH or the Renaissance of Islam*, vol 1 (Mohamed Abd Alhadi Abu Raidah tr, 5th edn, Dar Alketab Alarabi 1947) 308.

¹³ *ibid*.

¹⁴ Adam Jones, 'Female Slave – Owners on the Gold Coast: Just a Matter of Money' in Stephan Palmie (ed), *Slave Culture and the Cultures of Slavery* (University of Tennessee Press 1995) 101.

¹⁵ Milton Meltzer, *Slavery: A World History*, vol II (Da Capo Press 1993) 1.

branded slave traders.¹⁶ After that, slaves overtook gold as the main export of the country. Afterwards, the Dutch, Danes and the English all replaced the Portuguese and took over the trading of slaves.¹⁷ From here, the trade expanded to all parts of America and Europe. Consequently, the Gold Coast became the main source of the slave trade, ultimately playing a significant role in the Atlantic trade. The local economy was boosted and the area became highly commercialized.¹⁸

Slaves are under ownership, and because of that ownership they are obliged to perform certain tasks the owner requires of them. They are subjugated and the owner has right over their bodies.¹⁹ The relationship is not mutually beneficial and is strictly economic and social. For example, slaves were viewed with disgust as animals or ugly creatures.²⁰ As a result of this view, people thought it right to abuse slaves or utilize other cruel means to keep them under their control.²¹ As the slaves were determined by skin colour, it spread racism. This could be seen from the racism against black people in America,²² and so it could be concluded that American racism brewed as a product of slavery. Therefore, the slave trade involving black people became engraved as the traditional form of slavery.²³

Almost all major civilizations have had a significant hand in slavery and, as such, it has caught children in its midst. It has had such an impact that some children were born as slaves, which means that they came under the possession of a slave owner since birth.²⁴ International law took freedom from slavery as one of its earliest considerations. Prohibitions against the slave trade and slavery itself were, in the early

¹⁶ Blackburn (n 2) 102.

¹⁷ Jones (n 14).

¹⁸ Richard Rathbone, 'The Gold Coast, the Closing of the Atlantic Slave Trade, and Africans of the Diaspora' in Stephan Palmie (ed), *Slave Culture and the Cultures of Slavery* (University of Tennessee Press 1995) 55.

¹⁹ International Labour Organization, *Forced Labour and Human Trafficking: Casebook of Court Decisions* (ILO 2010) 20.

²⁰ Blackburn (n 2) 105.

²¹ Kevin Bales, *New Slavery: A Reference Handbook* (2nd ABC-CLIO Inc 2004) 3.

²² Eric Eustace Williams, *Capitalism and Slavery* (Andre Deutsch 1964) 7.

²³ A Yasmine Rassam, 'Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade under Customary International Law' (1999) 39(2) *Va J Intl L* 303, 319.

²⁴ Trevor Buck and Andrea Nicholson, 'Constructing the International Legal Framework' in Gary Craig (ed), *Child Slavery Now* (The Policy Press 2010), p. 43

nineteenth century, one of the key features in more than 75 conventions.²⁵ However it was not until 1926 that a tipping point was reached and the League of Nations (LN) Slavery Convention 1926²⁶ set out a proper definition of slavery, leading to proper identification and understanding of slavery under international law. Slavery can be defined as the status or condition of a person over whom all or some power leading to the right of ownership can be employed.²⁷ Hence, the slave trade was believed to encompass all acts involved in selling, purchasing, disposal, acquisition, or exchange of a person with the object of turning them into slaves, and this in extension included all acts or transporting or trading slaves.²⁸

Due to these definitions, the relationship between owners and their slaves became clear; the slave was denied any independent character, and the owner had total control over the slave. A slave's personal rights were not considered, and he was expected to carry out orders without any objection. These trademark practices of slavery, even though referred to as a thing of the past, are still being practised in the current age. It is for that reason that human trafficking is called modern-day slavery, and despite slavery's formal abolition, it continues today, albeit in different forms.

1.3 HUMAN TRAFFICKING IN HISTORICAL PERSPECTIVE

This section will consider human trafficking legislation as a separate issue from slavery.²⁹ As per this legislation, human trafficking is understood to be a separate crime. Modern-day slavery or human trafficking is mostly undertaken for either sexual

²⁵ Anne T Gallagher, *The International Law of Human Trafficking* (CUP 2010) 179. For example, Treaty of Paris 1814, A Definitive Treaty of Peace Between his Britannic Majesty and his most Christian Majesty Louis XVIII (Signed in Paris, 30 May 1814), 65 CTS 251 <http://en.wikisource.org/wiki/Treaty_of_Paris_%281814%29> accessed 25 Jan 2014; Treaty of Paris 1815, Definitive Treaty [Peace Treaties] between Great Britain and France (Signed in Paris, 20 November 1815), 65 CTS 251 <http://en.wikisource.org/wiki/Treaty_of_Paris_%281815%29> accessed 25 Jan 2014.

²⁶ Slavery Convention (adopted 25 September 1926, entered into force 9 March 1927) LN Doc 60 LNTS 253.

²⁷ Slavery Convention, art 1(1).

²⁸ Art 1(2). Furthermore, the UN document defines slavery as 'any form of dealing with human beings leading to the forced exploitation of their labour': UN, *Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities* (1982) UN Doc E/CN.4/Sub.2/1982/20, para 9.

²⁹ It is estimated that between 1815 and 1957 some 300 international agreements were implemented to suppress slavery: UNCHR, *Abolishing Slavery and its Contemporary Forms* by David Weissbrodt and Anti-Slavery International (2002) HR/PUB/02/4, para 5.

exploitation, prostitution or many types of forced labour.³⁰ This can be seen from the international instruments against human trafficking that have historically been issued to safeguard people from exploitation.

1.3.1 International Agreement for the Suppression of the White Slave Traffic 1904 (White Slave Traffic Agreement, 1904)³¹

This was the first Agreement related to the prevention of what would not be classified as human trafficking. It was adopted in response to the financial situation in some European cities which led to the sale of women and girls for labour and sexual exploitation.³² In Europe, thirteen states favoured the measures to put an end to the practice of selling individuals.³³ Upon inspection the Agreement infers that racial discrimination and ethnicity came into play during its draft. However, the drafters may have intended to protect women from being sold into forced prostitution by this 'white slave legislation' rather than to hold the traffickers accountable.³⁴ This is evidenced by the fact that the legislation tends to deal with forced employment into prostitution, rather than the abusive nature of prostitution itself.

Furthermore, the problem with trafficking was conventionally related to white slave traffic, in particular, the trafficking of white women. This puts the legislation in a different group from those related to the slave trade concerned with the trafficking of black slaves from Africa. Slavery legislation did not apply to any persons other than white women because of how the term 'white slavery' was used, chiefly in Europe, to indicate women who were forced into prostitution or those who worked in particularly harsh conditions.³⁵ As a result, the 1904 White Slave Traffic Agreement was not intended to prevent trafficking of white men and boys, or black people. This

³⁰ Conny Rijken, *Trafficking in Persons; Prosecution Form; A European Perspective* (TMC Asser Press 2003) 53.

³¹ (Adopted 18 May 1904, entered into force 18 July 1905) 35 Stat 426, 1 LNTS 83.

³² Nora V Demleitner, 'Forced Prostituting: Naming an International Offense' (1994) 18(1) Fordham Intl LJ 163, 167.

³³ Marlene D Beckman, 'The White Slave Traffic Act: The Historical Impact a Criminal Law Policy on Women' (1984) 72(2) Geo LJ 1111, 1111.

³⁴ Stephanie Farrior, 'The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential' [1997] 10 Harv Hum Rts J 213, 216.

³⁵ Demleitner (n 32) 165.

Agreement's provisions do not directly contribute to the reduction in white slave traffic as no provisions related to law enforcement even when, as per the Agreement, the member states were required to take measures and implement steps in various areas.³⁶ Therefore, it was not successful.³⁷

1.3.2 International Convention for the Suppression of White Slave Traffic 1910 (1910 White Slave Traffic Convention)³⁸

Due to the limitations of the 1904 White Slave Traffic Agreement, a new international instrument to deal with human trafficking was enacted six years later. This was the 1910 White Slave Traffic Convention. It differed from the 1904 Agreement in the sense that it advocated harsher punishments and used a stronger tone against trafficking women, whether such trafficking was done forcefully or through coercion.³⁹ Despite being similar to its predecessor in the fact that it took measures to safeguard white women only, it differed by dealing with trafficking between countries.⁴⁰ Furthermore, it recommended the contracting parties enact legislation to counter these crimes and to punish criminals. It also advocated starting a system of extradition in compliance with the pre-existing Agreement between contracting states.⁴¹ Trafficking in the 1910 White Slave Traffic Convention embodied a greater meaning than the 1904 Agreement. This was exhibited by the use of the word 'enticing', which meant attracting a girl or woman in order to recruit them into prostitution through lies or hypocrisy. Moreover, it mentioned the phrase 'even with her consent' to establish that human trafficking could be done against one's will or with one's consent.

The 1910 White Slave Traffic Convention established that human trafficking did not apply to people who ran brothels or forced labour, or those involved in transporting or

³⁶ Information exchange (arts 1 and 2), identification of victims (arts 1 and 4) supervision of employment agencies (art 5).

³⁷ Henry Wilson Harris, *Human Merchandise: A Study of the International Traffic in Women* (E Benn Limited 1928) 38.

³⁸ LN, 3 LNTS 278 (adopted 4 May 1910, entered into force 21 June 1915) as amended by Protocol Amending the International Agreement for the Suppression of the White Slave Traffic, and Amending the International Convention for the Suppression of the White Slave Traffic, 2 UST 1999, 30 UNTS 23.

³⁹ Art 2.

⁴⁰ Art 1.

⁴¹ Arts 3, 4 and 5.

trading the women involved. This is because it was a matter under the jurisdiction of individual member states to enforce the law against prostitution.⁴² Alternatively, it means that the Convention did not mention the final purpose of forced prostitution. Moreover, the Convention did not require States to criminalize prostitution, but simply to criminalize human trafficking. Consequently, the scope of the Convention was limited.⁴³ The seriousness of the issue of human trafficking was recognized by the LN, and they issued a ruling on international trafficking of humans to protect children and women from being exploited.

1.3.3 International Convention for the Suppression of the Traffic in Women and Children 1921 (1921 Traffic Convention)⁴⁴

This was the third international instrument against human trafficking. At first, it supported the definition of trafficking in the 1910 Convention.⁴⁵ As a result, sexual exploitation and forced prostitution were taken as an important aspect of trafficking. The main achievement of the 1921 Traffic Convention was in the fact that it did not include the factor of colour, which was thought to be the main negative limitation in the preceding White Slave Conventions. Consequently, this Convention could be applied to black or white women and children of both genders, but did not apply to adult men. However, the focus was still on trafficking. Therefore, international actions were just as limited as they had been previously.⁴⁶

1.3.4 International Convention for the Suppression of the Traffic in Women of Full Age 1933⁴⁷

This became the fourth international instrument against human trafficking. Despite this Convention using the same language as the preceding White Slave Conventions, it

⁴² UN, Department of International Economic and Social Affairs, *Study on Traffic in Persons and Prostitution* (1959) UN Doc ST/SOA/SD/8, 1.

⁴³ Janie Chuang, 'Redirecting the Debate over Trafficking in Women: Definition, Paradigms and Contexts' (1998) 11 Har Hum Rts J 65, 74-75.

⁴⁴ LN (adopted 30 September 1921, entered into force on 15 June 1922) 9 LNTS 416.

⁴⁵ Art 1.

⁴⁶ Demleitner (n 32) 170.

⁴⁷ LN (adopted 11 October 1933, entered into force on 24 August 1934) 150 LNTS 431.

offered the member states a new factor of jurisdiction over human trafficking taking place in their territory. The member states could then punish traffickers that trafficked women internationally for the purpose of prostitution, irrespective of whether she had consented or not.⁴⁸ That is, the factor of trafficking women for forced prostitution abroad is an important requisite for the persistence of trafficking of women as per this Convention. Furthermore, in cases where women have been trafficked internationally after recruitment and transport for prostitution, the States were required to punish them as per the Convention.

An important feature of this 1933 Convention is that it does not take coercion into account as an important factor of the crime of trafficking, as long as international trafficking of women is involved. However, consent remains an important element in cases of internal trafficking.⁴⁹ Even if trafficking has to be coercive as per the Convention, it does not acknowledge the requirements of coercion for labour and prostitution. Despite that, it is at times difficult to prove that the victim was recruited and transported against her will, (women of full age being the sole focus of this convention) especially if false promises were involved.

The four international instruments to prevent human trafficking discussed above all proved ineffective. This resulted from the fact that the provisions were for the trafficking process and not for exploitation of trafficked persons. These instruments also failed because they only addressed forced prostitution as a domestic concern and as such did not force the States to put an end to the process.⁵⁰ As a result, trafficking continued to grow.

1.3.4.1 The League of Nations Draft Convention of 1937

The LN took notice that brothels had played a part in allowing trafficking to flourish.⁵¹ Also, people were coming to accept that prostitution was not something that was a matter solely for the domestic jurisdiction. The LN drafted the Convention of 1937 so

⁴⁸ Art 1.

⁴⁹ Rijken (n 30) 55.

⁵⁰ Chuang (n 43) 75.

⁵¹ *Study on Traffic in Persons and Prostitution* (n 42) 1-2.

that international cooperation could be increased in order to eliminate prostitution, punish traffickers and rehabilitate victims. However, World War II broke out and this draft could not be signed. Following the war, the United Nations (UN) was formed with diverse goals, including the maintenance of international peace and security, solving international problems, developing relations among nations, and supporting human rights.⁵² In order to make improvements, the UN Secretary-General reconsidered the LN's draft 1937 Convention,⁵³ and this led to the subsequent 1949 UN Convention.

1.3.5 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others 1949 (UN 1949 Trafficking Convention)⁵⁴

This Convention superseded the aforementioned four treaties and dealt with both trafficking and exploitation, as is evident from the title of the Convention. This instrument was gender-neutral in terms of dealing with subjects of trafficking for forced prostitution and also dealt with both domestic and international trafficking. The member states were obliged to act in the three relevant areas: prevention, prohibition and protection (3Ps). Binding the member states to prohibit trafficking for labour and sexual exploitation helped to combat human trafficking itself.⁵⁵ The prohibition encompasses the prosecution of clients, pimps and brothel owners.⁵⁶ Member states further agreed to specific enforcement methods and to take part in mutual administrative and enforcement activities with others.⁵⁷ Lastly, member states were also appointed with the task of taking all measures to suppress the cause of trafficking by utilizing their private and public educational, social, health, financial and other related services.⁵⁸ Thereby, the Convention tries to deal with both the result (exploitation of prostitution) and the process of trafficking itself (obtainment, enticement, or seduction).⁵⁹ It should not be assumed that all acts prohibited by this Convention (result and process) fell under the category of 'trafficking'. However, it is

⁵² Malcolm Evans, *International Law* (OUP 2003) 291.

⁵³ *Study on Traffic in Persons and Prostitution* (n 42) 2.

⁵⁴ UN (adopted 21 March 1950, entered into force 25 July 1951) 96 UNTS 271.

⁵⁵ Art 1.

⁵⁶ Art 2.

⁵⁷ Arts 14-15.

⁵⁸ Art 16.

⁵⁹ Art 1(1).

possible that this Convention was the first to have come close to understanding contemporary trafficking,⁶⁰ as distinct from the earlier concept of slavery.

In the view of this author, the UN 1949 Trafficking Convention is considerably weak. However, it did resolve certain issues dealing with gender, consent, and the meaning of punishment. Particularly, the terms 'exploitation' and 'prostitution' were not defined by the Convention; nor did they differentiate between voluntary and forced prostitution.⁶¹ Moreover, the Convention did not directly ask individual States to enact laws to prevent acts of prostitution.⁶² The criticism of the Convention came from the fact that, despite the number of prostitutes reducing, it did not succeed in either reducing prostitution to an acceptable level or safeguarding victims that 'consented' to trafficking.⁶³ The distinct concepts of free and forced prostitution still remain unclear and this issue was a topic of discussion throughout the drafting of the latest international instrument on human trafficking, the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2000 (UN Trafficking Protocol), discussed below.

Trafficking in women and children continued to rapidly grow despite the efforts of the international community. Usually, it is children and young women that are smuggled internationally and forced to work in harsh conditions, whether that be for prostitution or other forms of forced labour. The hidden nature of human trafficking makes it difficult to accurately estimate the number of victims anywhere across the globe. For instance, it is estimated by the US Government that approximately 700,000 to 4 million individuals are trafficked internationally across the globe annually, most of whom are women and children, while each year 50,000 individuals are trafficked to the US for the purpose of sexual exploitation.⁶⁴

⁶⁰ Gallagher (n 25) 15.

⁶¹ Barbara Sullivan, 'Trafficking in Women: Feminism and New International Law' (2003) 5(1) Intl Fem JP 67, 68-69.

⁶² Art 6.

⁶³ *Study on Traffic in Persons and Prostitution* (n 42) note 5, v-vi.

⁶⁴ US Department of State, *Trafficking in Persons Report* (June 2002) 3; Amy O'Neill Richard, 'International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime' [1999] Centre for the Study of Intelligence iii. The first of these cases was in 1995 when the first case of human trafficking for forced labour was discovered relating to a manufacturer of clothing owned by Chinese families in El Monte, California.

The issue has been addressed by various international organizations through conferences, plans, and action programs so that the real extent of human trafficking can be properly defined. For instance, the 1993 World Conference on Human Rights, in Vienna, issued the Vienna Declaration and Programme of Action (VDPA) and was taken up by 171 States.⁶⁵ The VDPA concerns itself with the rights of children and women, explains international trafficking as a type of gender-based violence, and advocates for its end through national and international legislation. Non-governmental organizations (NGOs) and inter-governmental organizations, like the Global Alliance Against the Trafficking of Women (GAATW),⁶⁶ have voiced the need to for a precise and clear definition of trafficking. This has led to trafficking being described chiefly in terms of its final objective, thereby resulting in a distinction being made between trafficking and forced labour or slavery-related practices. According to the GAATW, trafficking means the recruitment and transport of individuals by force, debt bondage, threats, or other forms to provide services or work nationally or internationally, and is separate from forced labour or slavery-related practices in the sense that they require procurement of services or work from a person using the methods described for trafficking.⁶⁷ Trafficking, as per this definition, involves transportation and recruitment for services or work, without reference to exploitation. In such cases, it becomes difficult to identify a situation where a person is smuggled into a country for voluntary labour, smuggling of human beings being a different crime, covered by the Protocol against the Smuggling of Migrants by Land, Sea and Air. This is problematic because not only is smuggling and forced labour different types of crime, but so too is exploitation through unfair working conditions (a matter for employment law) and forced labour/slavery-like practices (a matter for criminal law) are different entities. As such, if taken literally, the definition of trafficking involves crimes of human trafficking that occur without any exploitation. This is unsatisfactory, and adding to the confusion in this area. A conventional and widely known definition of forced labour is the

⁶⁵ UNGA, Vienna Declaration and Programme of Action (12 July 1993) UN Doc A/CONF.157/23.

⁶⁶ The GAATW was formed as a result of the International Workshop on Migration and Traffic in Women in 1994 (Chiang Mai, Thailand).

⁶⁷ GAATW, 'Standard Minimum Rules for the Treatment of Victims of Trafficking in Persons, Forced Labour and Slavery-Like Practices' (Unpublished manuscript, on file with Harvard Human Rights Journal 1994). The definition has been used by NGO women's rights groups as a first step in assessing alternative policies to combat trafficking, forced labour, and slavery-like practices.

International Labour Organization's (ILO) Forced Labour Convention 1930.⁶⁸ Forced labour is not just the responsibility of a single entity, but rather a collection of conditions and circumstances.⁶⁹ According to Skrivankova, human trafficking and forced labour are on a continuum of labour exploitation which ranges from decent work to forced labour.⁷⁰ It is arguable that slavery, slavery-like conditions, through to human trafficking and then on to labour exploitation through unfair employment practices, are based on a continuum, ranging from the most severe to the less severe. These crimes (or for labour exploitation, illegal activities) are distinct, but do overlap, and require different legal and law enforcement responses. The more extreme end of this continuum is also a matter for organized crime legislation⁷¹ and law enforcement responses, with slavery through to human trafficking needing to be distinguished from smuggling of migrants as discussed further in Chapter 3, which is a migration crime, requiring a border control law enforcement response.

It can be said that forced labour begins with deception and then transforms to become force and compulsion.⁷² This has been reported by Skrivankova,⁷³ according to whom practices begin with simple work involving major and minor abuses of the law, and eventually result in dangerous levels of forced labour.

After the International Organization for Migration (IOM) claimed that the number of trafficked victims in 1997 amounted to 4 million,⁷⁴ both nationally and internationally, the UN formed an Ad Hoc Committee on organized crime to formulate a Protocol to suppress human trafficking. In order to combat human trafficking, both governmental

⁶⁸ ILO Forced Labour Convention (No 29) (1930), art 2 provides that forced labour is 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered him voluntarily'. It is important to mention that the International Labour Organization (ILO) has adopted a new legally binding Protocol designed to strengthen global efforts to eliminate forced labour: Protocol of 2014 to the Forced Labour Convention 1930 <http://www.ilo.org/global/about-the-ilo/media-centre/press-releases/WCMS_246549/lang--en/index.htm> accessed 25 June 2014.

⁶⁹ Klara Skrivankova, 'Between Decent Work and Forced Labour: Examining the Continuum of Exploitation' [2010] Joseph Rowntree Foundation 4.

⁷⁰ *ibid.*

⁷¹ See further in Chapters 2 and 3.

⁷² Bridget Anderson and Ben Rogaly, 'Forced Labour and Migration to the UK' (Study Prepared by COMPAS in Collaboration with the Trades Union Congress, 2005) 39 <<https://www.tuc.org.uk/international/tuc-9317-f0.pdf>> accessed 23 May 2013.

⁷³ Skrivankova (n 69).

⁷⁴ *Trafficking in Persons Report* (June 2002) (n 64) 3.

organizations and NGOs have played an important part in the development of international instruments.⁷⁵ After various sessions, the Ad Hoc Committee completed the Organized Crime Convention and its Trafficking and Smuggling Protocols, the final draft of which was approved in Palermo, Italy, in December 2000.

1.3.6 The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children 2000 (UN Trafficking Protocol)⁷⁶

This Protocol holds special importance because it contains the most comprehensive definition to date of trafficking that has been internationally agreed.⁷⁷

Ever since the promulgation of this Trafficking Protocol, concerns have been voiced over the extent of legal intervention in human trafficking. During the first reading of the Protocol, it was debated whether to include in the Protocol only women and children, or all persons. The primary drafts indicate that the drafters intended to address the trafficking of women and children only. However, informal consultations on the draft led to the revision of the Trafficking Protocol, making it more comprehensive and ultimately including all persons regardless of age, gender or race. As a result, the United Nations General Assembly (UNGA) approved the diversification of the Protocol to include trafficking in persons, especially children and women.⁷⁸ The Ad Hoc Committee was focused on creating a comprehensive legal international instrument to counter transnational organized crime. Since the signature and ratification of the United Nations Convention against Transnational Organized Crime 2000 (UN TOC Convention)⁷⁹ was given the highest importance, the Trafficking Protocol became considered as an optional Protocol, complementing the Convention

⁷⁵ LeRoy G Potts, 'Global Trafficking in Human Being: Assessing Success of the United Nation Protocol to Prevent Trafficking in Persons' (2003) 35(1) Geo Wash Intl L Rev 227, 238-239.

⁷⁶ UNGA, UN Doc A/RES/55/25, Annex II, art 3(a). As of 9 March 2013, there are 154 State parties and 117 Signatories to the UN Trafficking Protocol: UNODC, 'Signatories to the United Nations Convention against Transnational Crime and its Protocols' <<https://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>> accessed 9 March 2013.

⁷⁷ Ann T Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23(4) Hum Rts Qua 975, 1004.

⁷⁸ UNGA, Report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the Works of Its First to Eleventh Sessions (3 November 2000) UN Doc A/55/383, para 54.

⁷⁹ See (n 76).

and only including specific offences. Moreover, since it was an optional Protocol, it had to maintain an approach that accorded with the Convention and could be applied to the provisions of the Convention.⁸⁰ On 10 December 2002, the KSA has signed both the UN Protocol against the Smuggling of Migrants and the UN Protocol to Prevent, Support and Punish Trafficking in Persons, Especially Women and Children. The UK signed on 14 December 2000, as discussed further in Chapter 2.⁸¹

The UN Trafficking Protocol defines human trafficking as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.⁸²

Subsequently, at the European regional level, the Council of Europe Convention on Action against Trafficking in Human Beings 2005⁸³ (COE Trafficking Convention) adopted the same definition,⁸⁴ and recently adopted the Council of the European Union (EU Council) Directive 2011/36/EU of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, ultimately replacing Council Framework Decision 2002/629/JHA (EU Directive 2011/36/EU).⁸⁵ The EU Council Directive maintained the same definition as the UN Trafficking Protocol, so that

⁸⁰ Kuanruthai Siripatthanakosol, 'Human Trafficking for Sexual Exploitation: The Framework of Human Rights Protection' (DPhil thesis, Newcastle University 2010) 106.

⁸¹ UN Office on Drugs and Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime New York, 15 November 2000 <<https://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>> accessed 15 October 2014.

⁸² UN Trafficking Protocol, art 3(a).

⁸³ COE (adopted 16 May 2005, entered into force 1 February 2008) CETS No 197. As of 9 March 2013, 39 States have ratified the COE Trafficking Convention: COE, 'Status of Signature and Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings' <http://www.coe.int/t/dghl/monitoring/trafficking/Flags-sos_en.asp> accessed 09 March 2013.

⁸⁴ Art 4.

⁸⁵ EU [2011] OJ L 1001/1, art 2.

domestic laws could share similar aspects.⁸⁶ However, the EU Council Directive includes new types of exploitation including begging or exploitation of criminal activities.⁸⁷ Forcing people to take part, *inter alia*, in shoplifting, pickpocketing, drug trafficking, and other similar activities for financial gain that are subject to penalties, are included within the exploitation of criminal activities.⁸⁸ Making the comparative analysis of the laws of the KSA and the UK feasible in this thesis is the fact that both jurisdictions have, despite their very different legal traditions and frameworks, adopted the same definition of trafficking – the one set out by the UN Trafficking Protocol and, coincidentally for the KSA (which is not a member of the COE), the COE Trafficking Convention.

1.4 GENERAL BACKGROUND TO THE STUDY

Widespread human trafficking in most parts of the world has led to massive proliferation of gross human rights violations; however, these human rights are defined. In the EU/UK the principal human rights legal document is the Council of Europe (COE) Convention on Human Rights, with similar rights, known as fundamental rights, also found in the EU Charter of Fundamental Rights 2000 and in the common law tradition of the jurisdictions which make up the UK (acknowledging that Scotland is more of a hybrid legal jurisdiction between common law and a pre-codified civil law). The KSA mainstream Islamic law, and key Islamic law texts, contain many principles which determine the approach with which the laws of the KSA should approach this matter. An examination of the KSA approach to Islamic law is required in the context of tackling the current UN definition of the crime of trafficking in human beings. While the researcher is not an Islamic scholar per se, an attempt to apply Islamic law principles to this crime area will be made in Chapter 6. This is a matter which should be further examined by Islamic law scholars deeply embedded in the various Islamic law traditions which exist globally, and in particular in the context of the Islamic law

⁸⁶ Rona Epstein and Nicholas Squires, 'The European Convention Against Trafficking' (2007) 171(22) *Jus Pea Loc Gov L* 391, 391.

⁸⁷ Iveta Cherneva, 'Human Trafficking for Begging' (2011) 17 *Buff Hum Rts L Rev* 25, 25-74.

⁸⁸ EU [2011] OJ L 1001/1, art 2 and the Preamble, para 11.

tradition as implemented by the laws and within the constitutional and legal framework of the KSA.

In modern terms, the crime which is the focus of this thesis is widely referred to as 'trafficking', and the phenomenon has adversely affected the provision of justice to humanity. The existence of this phenomenon is evidenced in various risk-prone societies where justice has been evaded due to weak regulations and imbalance of power. If human trafficking continues to remain uncontrolled, it is likely to pose even greater risks for future generations, since it involves various interest groups across national boundaries. This could lead to a massive increase in human trafficking as it penetrates from one community to another, as respect for national boundaries evades these interest groups.

The nature of crime in trafficking is of vital interest to local and international communities as it directly impacts human lives. Hence, it remains essential for the researcher to understand the interlinked branches of law in order to draw meaningful conclusions and make recommendations for further research and policy actions.

Human trafficking is considered the fastest-growing international illegal activity. Furthermore, it generates a hefty income.⁸⁹ It is estimated that approximately 600,000–800,000 people are trafficked across borders annually. This estimate does not include the millions of locally trafficked victims. The majority of these individuals are women and children.⁹⁰ Almost 20.9 million people have been victims of forced labour across the globe. Another way of viewing this is that 3 out of every 1,000 people were somehow involved in trafficking for forced labour during the years 2002 to 2011.⁹¹ Traffickers are estimated to make an annual income of \$9.5 billion.⁹² Hence, human trafficking is starting to replace drug smuggling because of the lower risk and higher generation of income.⁹³

⁸⁹ Pino Arlacchi, 'Opening Statement' (UNODC) <http://www.unodc.org/unodc/en/about-unodc/speeches/speech_2000-11-28_1.html> accessed 11 September 2014.

⁹⁰ US Department of State, *Trafficking in Persons Report* (June 2007) 8.

⁹¹ ILO, *Global Estimate of Forced Labour: Results and Methodology Report* (ILO 2012) 13.

⁹² US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2005).

⁹³ Arlacchi, 'Opening Statement' (n 89).

Victims of trafficking are usually people in search of better standards of living. Populations living in poverty, with minimal employment opportunities, are the most vulnerable to trafficking. It is in search of a better life that a vulnerable populace falls prey to trafficking interest groups (traffickers). The traffickers promise a better life while facilitating immigration into a richer country, where there are perceived ample economic opportunities. However, it is upon arrival that the trafficked people discover the kinds of services required from them, mostly under slavery-like conditions.⁹⁴

Human trafficking involves the transfer of people without consent for the purpose of sexual or labour exploitation or removal of organs, to be sold at a premium to highest bidders.⁹⁵ Usually trafficking implicates at least three classifications of states/countries in the process by reason of the crossing of borders as follows: the country of origin, the country of transit and the country of destination.⁹⁶ According to recently published estimates, between 700,000 to 4 million people are moved illegally every year, by more than one person,⁹⁷ evidencing the deep penetration of the interest groups involved in these crimes against humanity.

This rising phenomenon has sparked widespread international debate and condemnation.⁹⁸ However, despite the growing attention, possibly assisted by increased globalization, trafficking over the years has increased and evolved into more organized crime, where various criminal syndicates work in tandem for each other's benefit. The increasing involvement of various transportation and exploitation groups points towards an increasing trend of human rights violations in Western countries against immigrant workers. After the adoption of restrictive immigration policies by

⁹⁴ Gert Vermeulen, 'International Trafficking in Women and Children' (2001) 72(3) *International Review of Penal Law* 837, 841-842.

⁹⁵ Joachim Hagopian, 'Global Human Trafficking: A Modern Form of Slavery' (Global Research 2014) <<http://www.globalresearch.ca/global-human-trafficking-a-modern-form-of-slavery/5377853>> accessed 11 September 2014.

⁹⁶ John Winterdyk and Philip Reichel, 'Introduction to Special Issue: Human Trafficking - Issues and Perspectives European' (2010) 7(1) *Eur J of Criminology* 5, 6.

⁹⁷ US Department of State, *Trafficking in Persons Report* (June 2003) 3.

⁹⁸ International efforts to combat trafficking date back to 1910 with the International Agreement for the Suppression of the White Slave Traffic, the 1921 International Convention for the Suppression of the Traffic in Women and Children, the 1926 Slavery Convention and the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others: UNGA, *Report on Traffic in Women and Girls* (24 August 1995) UN Doc A/50/369,

Western governments, the aspiring immigrant workers seek help from these criminal organizations but fall prey to exploitative techniques.⁹⁹

The focus of this research is to study human trafficking from the perspective of forced labour. It is important to note that there are other forms of human trafficking such as forced prostitution and begging. However, in the interest of developing an in-depth analysis in this thesis, the focus will be on the forced labour aspect of human trafficking. Other scholars will have to take up the challenge of addressing the other aspects of human trafficking. In the local context the research will examine the efforts undertaken by the Saudi Government for this elimination of this heinous crime with respect to the provision of basic human rights. In the 2014 report *Trafficking in Persons*, the US Department of State categorized KSA as a Tier 3 country,¹⁰⁰ which means: 'The Government of Saudi Arabia does not fully comply with the minimum standards for the elimination of trafficking and is not making significant efforts to do so.'¹⁰¹ This thesis will attempt to investigate the current legal and law enforcement framework, its law enforcement opportunities, and make recommendations in order, not only to address the above UN criticism, but to also make the KSA a safer country for all its citizens and residents.

Saudi Arabia is one of the top ten countries that people wish to emigrate to in search of the employment opportunities¹⁰² it presents due to its strong economy and its Islamic status. Uniquely, the KSA faces an annual migration/ smuggling / human trafficking challenge with the Islamic pilgrimage of the Hajj. According to Ksnawi a number of pilgrims each year do not return to their countries of origin, but illegally remain in the KSA seeking employment.¹⁰³ This category of pilgrims is always exploited by groups of people who often are their compatriots¹⁰⁴ a matter which will be covered

⁹⁹ Vermeulen (n 94) 884.

¹⁰⁰ See further discussion in Chapter 6.

¹⁰¹ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2014).

¹⁰² Neli Esipova, Julie Ray and Rajesh Srinivasan, 'The World's Potential Migrants Who They Are, Where They Want to Go, and Why It Matters' (2011) 3 <<http://www.imi.ox.ac.uk/pdfs/the-worlds-potential-migrants>> accessed 25 October 2014.

¹⁰³ Mahmoud Ksnawi, 'Processing of Iqama and Labour Systems for Illegal Migrants' (Umm Al Qura University 2011) <https://uqu.edu.sa/files2/tiny_mce/plugins/filemanager/files/3960606/l.doc_> accessed 12 May 2014

¹⁰⁴ Khalid Al-Harbi, 'The Victims of Trafficking of Children' (Naif Arab University for Security Sciences, Riyadh 2010) 101.

further in Chapter 7. Hence, it becomes doubly important for the country's administration to ensure human rights protection while combating human trafficking. It should also create an enabling environment where all sections of society can practise their social, cultural and religious rights under a clear law, thus ensuring a life of dignity.

Finally, the causes of human trafficking in the UK and KSA will be examined as there may be core factors leading to forced labour, such as persistence of the sponsorship (*Kafala*) system in the KSA or poor education, with a view to making recommendations with regard to law enforcement in this area. However, various researchers and their studies believe otherwise. Hence, government efforts and national legislature of the case study countries are critically observed to underline effective methods for anti-trafficking legislation.

1.5 SCOPE AND LIMITATIONS OF THE STUDY

The principal focus of this study is to analyse the regional and international legal instruments implemented by the EU and the UN in order to counter trafficking and safeguard the victims. While choosing countries for the study it was borne in mind that the KSA was a member of the UN, while the UK is, in addition to being a member of the UN, heavily influenced, legally, by its membership of the EU, and to a lesser extent, but equally importantly, the COE, and therefore the UK has international and supranational legal obligations beyond those of the KSA, and has therefore different legislation to deal with human trafficking. Another reason for choosing these countries was because of the differences between the behaviour and mentality of the domestic authorities in terms of application of the law, as well as their legal outlook on the aspects of the trafficking offence. Close observation of important binding legal instruments that these countries have ratified or signed and that pertain to trafficking makes the evaluation and analysis more detailed.

While this thesis focuses the forced labour aspect of human trafficking it also discusses aspects of sexual and labour exploitation in order to explain the phenomenon. While the study deals with trafficking of all people, and not just women and children, it is

well documented that women are the primary victims. Furthermore, this study acknowledges that human trafficking is a crime that affects both genders and takes into account the forces needed to bring legal accountability to criminals who engage in trafficking.

Human trafficking can occur both regionally and internationally. While the issue of immigration control is not the focus of this thesis, this research does examine various rules on immigration in order that the distinction between human trafficking and human smuggling becomes properly defined. Even though these two offences are similar and connected in many aspects, human smuggling does not present a huge threat to the exploitation of the smuggled people. Human trafficking, however, is an illegal activity that endangers human integrity, whereas human smuggling is more likely to be seen to endanger state integrity. This study will also refer to labour migration in this context. As human trafficking is usually conducted for financial reasons, this thesis will also examine money laundering as an issue which needs to be taken into account by law enforcement agencies dealing with human trafficking.

1.6 AIMS AND OBJECTIVES OF THE STUDY

The primary aim of the thesis is to provide a critical and comparative analysis of the legal systems of the KSA and the UK in terms of human trafficking for forced labour to identify the weaknesses and strengths of each; specifically, to address the weaknesses in the KSA system as compared to the UK system.

The second aim is to determine the differences in the regulations against human trafficking in the UK and the KSA. This discussion shall be based on the transnational guidelines of these two countries.

The third aim is to analyse the synchronization between the KSA and the UK legislation as being, predominantly, the countries of 'transit' and 'destination' of human trafficking.

The above aims shall be pursued in this study with the help of the mechanics set below:

- a. By examining the existing UN and EU regulations for criminalizing human trafficking as well protecting trafficked victims.
- b. By evaluating the existing national and transnational legal measures to combat human trafficking and the degree to which they have an influence on domestic trafficking.
- c. By analytically comparing the response of both the UK and the KSA in adopting these measures and regulations against trafficking.

1.7 CONTRIBUTION TO KNOWLEDGE

This study has great potential significance because it assesses the legal human trafficking frameworks at various levels. These levels include the domestic level, the regional level (EU) and the global level (UN). The assessment is performed on three distinct platforms, that is, prevention, protection, and punishment, by comparing the legal systems of the KSA and the UK, which are entirely diverse in their form. Naturally, such an extensive coverage makes this study noteworthy, as this kind of my PhD thesis has never been done before in English or Arabic legal literature.

It is hoped that this study will present the characteristics of and the contrast in the legal systems with respect to human trafficking. Since human trafficking is a diverse crime, its legal framework needs to appropriately address the protection of victims, the abolishment of this crime, and the punishment of criminals involved.

This study focuses on drawing attention to the significance of applying protective measures against forced labour in the KSA and the UK as human trafficking is a considerable problem in these countries.

The definition of human trafficking provided by the United Nations Trafficking Protocol has been employed in this study.¹⁰⁵ It regards the action of human trafficking as being based on the following characteristics:

¹⁰⁵ UNGA, Fifty-Fifth Session (adopted 15 November 2000) UN Doc A/RES/55/25, Annex II, art 3(a).

The act: this refers to the recruitment, transportation, transfer, harbouring, or receiving of individuals.

The means: this indicates the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person.

The purpose: this refers to the exploitation of the victims in terms of forced labour, sexual exploitation, slavery or actions based on slavery (like the removal of organs, or servitude). Human trafficking has been defined slightly differently from the smuggling of migrants in international law, even though the two are similar to some extent.¹⁰⁶ This shall be discussed later.¹⁰⁷ In order to present a clear analysis of this issue, it is important to point out these major differences. Thus, the definition of trafficking in human beings encompasses the illegal movements of individuals for the purpose of forced labour or sexual exploitation, as per the features set out in the UN Trafficking Protocol. Moreover, the consent of the victims in the activity also makes a major difference. For example, a child (someone under the age of 18) not knowing any better might agree to being trafficked for sexual exploitation or forced labour in order to help his or her family have a better life.¹⁰⁸

Conclusively, it can be said that this study is focused on demonstrating how the UK and the KSA portray 'human trafficking' in their regional laws. A problem often faced during the information-gathering and investigation stages is the lack of available evidence against traffickers, a particular issue in the KSA.

¹⁰⁶ United Nations Smuggling of Migrants Protocol (adopted 15 November 2000, entered into force 28 January 2004) UN Doc A/RES/55/25, Annex III: 'Smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

¹⁰⁷ See further discussion in Chapter 2.

¹⁰⁸ Louise T Brown, *Sex Slaves: The Trafficking of Women in Asia* (Virago Press 2001) 34.

1.8 METHODOLOGICAL DISCUSSION

This study examines the current protection framework with regard to trafficking under the scope of the UN TOC Convention¹⁰⁹ and the UN Trafficking Protocol, and regionally under the scope of the COE Human Trafficking Convention.¹¹⁰ The purpose of the study is to examine in depth the response given to human trafficking at national and international levels. From the international perspective, this study shows and explains the manner in which human trafficking is portrayed, and the way in which it affects the international population. From a national perspective, this study demonstrates the dynamics of the legal system against trafficking, and the way it is recognized by communities that have different legal systems and cultures.

This study aims to establish whether the existing legal framework against human trafficking is sufficient to safeguard victims who lack a properly defined legal status. It is also important to appreciate that the victims are viewed differently within the scope of different national legal systems. For instance, these victims might be seen as being 'economic migrants' by some legislation, and some might view these individuals as being innocent victims of exploitation. Therefore, this study aims to present a clearer image of human trafficking by locating the flaws in the legal system and by suggesting how to construct a much more effective framework in order to safeguard victims.

Discussions on methodology begin with doctrinal analysis, which is regarded by McConville and Chui as 'a black-letter approach'.¹¹¹ Doctrinal analysis is important in this study as it helps demonstrate the adaptation of anti-trafficking regulations at national and international levels.

It cannot be denied that human trafficking is a multi-faceted activity. Thus, this research aims to include the normal legal framework for trafficking as well as the interdisciplinary research procedures. Also, the conflicts of methods seen between different researchers are not to be ignored; instead, this study seeks to analyse the

¹⁰⁹ UNGA (adopted 15 November 2000, entered into force 29 September 2003) UN Doc A/RES/55/25.

¹¹⁰ COE (adopted 16 May 2005, entered into force 1 February 2008) CETS No 197.

¹¹¹ Michael McConville and Wing Hong Chui, *Research Methods for Law* (Edinburgh University Press 2007) 4.

various methods, determine their merits and demerits, and then select the most suitable method according to the requirements of the study.

It was the result of thorough research that a consensus of using comparative legal methods was agreed upon. The reason behind this choice was that, in comparing legal perceptions, it becomes possible to evaluate the meaning of human trafficking in the light of two or more legal systems, to better understand the subject.¹¹² Using the comparative legal method, the clarification, understanding, and application of legal principles used by international and national courts become easier.¹¹³ Not only is the comparative legal method a fine tool for a better approach to work, but it also opens ways to the actual application, namely, the expansion of policies of substantive law.¹¹⁴

This methodology is not a branch of law; rather, it is a legal scientific order.¹¹⁵ It has been asserted by Gutteridge that a legal system does not possess legal standards, does not hold a normative legal regulation objective and has no societal association or issues of regulation.¹¹⁶ Thus comparative law is simply a 'critical legal comparison' of the various international legal frameworks, as 'critical-legal comparison' is a chief feature of the comparative law.¹¹⁷

'Critical legal comparison' basically indicates a comparison among the legal systems of multiple countries. It provides steady scientific similarities in these legal systems as well as contrasting features present among these systems. Various attempts have been made in the comparative-juridical system in order to describe the idea of comparative law. Comparative law has been explained in the comparative juridical system in two styles:¹¹⁸

1. Being part of the specific juridical scientific discipline, comparative law is said to comprise scientific information. This refers to the primary ideas of comparative

¹¹² Michael Salter and Julie Mason, *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (Longman 2007) 3.

¹¹³ *ibid* 24.

¹¹⁴ Alexander Charles Kiss, 'Comparative Law and Public International Law' in William E Butler (ed), *International Law in Comparative Perspectives* (Sijhoff & Noordhoff International 1980) 41-48.

¹¹⁵ Blerton Sinani and Klodi Shanto, 'Methods and Functions of Comparative Law' (2013) 2 *Acta U Danubius Jur* 25, 25.

¹¹⁶ Harold Cooke Gutteridge, *Comparative Law* (The University Press Cambridge 1946) 1-2.

¹¹⁷ Konrad Zweigert and Hein Koetz, *An Introduction to Comparative Law* (OUP 1998) 2.

¹¹⁸ Sinani and Shanto (n 115) 26.

law together with a comparative legal method seen in the majority of international legal systems.¹¹⁹

2. Being a specific academic discipline, comparative law comprises all the thematic sections studied by law students.

The aim of comparative law is to promote comparative law methods with the help of legal phenomenon. There are three sectors to which comparative law is applied as a means of research:¹²⁰

1. Comparative law, as applicable to a comparative legal method that deals with legal procedures that pertain in particular to comparative legal aspects. Comparative law is applicable in the studies and reviews of various legal procedures (legal institutions, legal norms, legal systems) under the comparative legal aspect. Therefore, comparative law simply deals with studying and recognizing local laws of different states. This is why it is common to view the comparative legal studies of different countries, such as the UK and the KSA, within this system. Moreover, this method is also applicable for a comparative analysis of the different regulations for similar legal activities in different countries, cases, and times.
2. The dogmatic legal method. This comprises assessment, recognition, explanation, and precise detection of the legal literature seen in laws and systems. This method employs the use of contemporary methods of legal explanations, with special emphasis on verbal, rational, methodical, historical, and teleological explanations.¹²¹
3. The historical legal method. In this method, comparative law is used to study the evolution of legal traditions over the passage of time. It also focuses on understanding the development of legal systems from the beginning of time.¹²² It understands the birth of legal systems and their development in a historical and a particular socio-economic context.

¹¹⁹ *ibid.*

¹²⁰ *ibid* 28.

¹²¹ Radomir Llukiq, *Metodologijaprava (Methodology of Law)* (Beograd 1979) 109-113.

¹²² Yi Shin Tang, *The International Trade Policy for Technology Transfers: Legal and Economic Dilemmas on Multilateralism Versus Bilateralism* (Kluwer Law International 2009) 17.

Under the comparative law, the primary platform of comparison is the 'principle of functionality'.¹²³ According to this, a comparison is permissible between two functionally identical institutions that carry out similar jobs. The 'principle of functionality' is said to consist of two features according to Sinani and Shanto:¹²⁴

1. The function. Two different legal systems shall only be compared effectively if they carry out the same function. If this criterion is not fulfilled, as in the case of Sharia Law versus common law, then the entire legal logic behind the comparison is affected. It is mandatory to have similar features as well as demarcating features among the systems being compared.
2. The context. It is important to focus on the cultural, socio-economic, traditional, ethno-psychological, religious, historical, racial, and geographical characteristic of the legal systems under discussion.

There are two forms that a comparative study shall be assumed to pursue: it can either be presented on a small scale or large scale. For the former, the approach of various legal systems, their methodology, and thought processes are evaluated.¹²⁵ For the latter, a comparative study is run on a specific issue and the focus is on the legal systems and institutions involved in that specific issue.¹²⁶

Comparative studies usually evaluate legal findings and notions (such as the meaning of human trafficking) that arise from multiple legal systems, in order to provide a fruitful analysis of the issue concerned.¹²⁷ They help to determine, explain, and apply legal notions that the international and national settings are required to use.¹²⁸ This method expands outside the normal investigations and assesses practical legal processes, such as the expansion or regulations of substantive law.¹²⁹

¹²³ Zweigert and Koetz (n 117) 34.

¹²⁴ Sinani and Shanto (n 115) 31.

¹²⁵ Zweigert and Koetz (n 117) 4.

¹²⁶ *ibid* 5.

¹²⁷ Salter and Mason (n 112) 3.

¹²⁸ *ibid* 24.

¹²⁹ Kiss (n 114).

In this thesis, the focus is on comparative legal method in order to study the definition of human trafficking in the national and international law with regard to the KSA and the UK, and to study the legal insight with regard to this issue. The most effective way of carrying out this study was to first analyse the legal system of the KSA with regard to human trafficking, then to carry out the same process for the UK system, and then to compare the two. This way, the researcher was able to identify the shortcomings in the KSA system and then to make suggestions by using the elements from the UK system, which is subject to the ECHR. Given that the UK is a member of the COE and the EU, it is more likely that it will update its laws, unlike the KSA.

Moreover, the aim of this study is to determine the functional similarity of the laws of the two countries by using the principles and concept institutions for the purpose of comparison.¹³⁰ In this respect, there were two questions taken into consideration. First, what are the primary features to be focused upon for any anti-trafficking legislature? In other words, how should the international legislature focus itself on this issue from a global perspective?

Second, in what way should the anti-trafficking law be applied to a society as a unified law in order to provide the most perfect fulfilment of legal system in a society, and recognize the state of *praesumptio similitudinis*, which refers to an assumption that all practical outcomes are generally alike?¹³¹

Notwithstanding the effective methods employed in this research, several issues cannot be ignored. The doctrinal analysis demands that the research has to be conducted in a strictly legalized setting. This differentiates it from practical scenarios. Therefore, making use of qualitative methods partly removes this shortcoming in respect of this research and presents a much more practical approach to the issue of trafficking in terms of law and society.

¹³⁰ See further details of comparative legal method in Peter De Cruz, *Comparative Law in a Changing World* (3rd edn, Routledge-Cavendish 2007) 33, 236-238.

¹³¹ *ibid* 239.

However, it is crucial to ensure that all the methods are rightfully justified and to address any criticism that might be shown of the research with regard to the qualitative methods used.

Finally, it is important to consider the differences in legal systems, ethnicity, language and terminologies, and cultures when undergoing a comparative legal research.

A comparative legal method has been used in this study because both the UK and the KSA are members of the main international instruments designed to combat human trafficking – the UN TOC Convention and the UN Trafficking Protocol. Therefore, making use of this method essentially allows the researcher to recognize and assess the issue of human trafficking in the context of human trafficking as seen in the law of the KSA, and to attempt to resolve this issue by analysing similar problems and how they are dealt with in the law of the UK.

The main stages of study research included the collection of relevant material followed by a critical examination and evaluation of these materials.

At the initial stage, a general reading provided an overview of the subject. The second stage involved structured reading of the most relevant information including narratives setting out the recent binding legal instruments on human trafficking and the current legal situation. Following the initial period of desk research, a critical evaluation of texts was undertaken and findings were produced. Primary (legislative texts and case law) and secondary sources (for example books and articles, interpreting the core laws) constituted the basis for the writing of the study. Primary sources included mostly legal texts adopted in the framework of the EU, international conventions and acts adopted at a domestic level in the UK and Saudi Arabia. Specific case laws and precedents were also studied that were pertinent to the issue of human trafficking. Books and articles, interpreting various case laws, written by authorities in the area were critically analysed and various organizational reports such as the IOM and the ILO were also considered in order to arrive at conclusive evidence.

Varied library based research was carried out in Abertay Dundee University library, Dundee University library, Edinburgh University library and Naif Arab University For

Security Sciences in Saudi Arabia. Numerous legal databases (mainly Eur-lex for EU law, the Hudoc database of the European Court of Human Rights, LexisNexis and Westlaw for the UK and King Faisal library for Saudi Arabia) were accessed to find articles and case law. The inter-library loan system was also accessed for collection of secondary sources. In addition to the mentioned resources, a number of international organizational online databases were accessed and were of great importance for the analysis and interpretation of primary sources. These were useful in terms of providing an overall representation of the global trafficking statistics, existing relevant laws and measures being undertaken at various stages.

1.9 GENERAL STRUCTURE OF THE STUDY

In this study, the issue of human trafficking as a criminal offence is discussed in eight chapters. Chapter 1 will describe how human trafficking has developed over time, requiring legislation to keep pace with improved communication and transportation and new manifestations of exploitation by traffickers.

The chapter describes how slavery and the slave trade functioned in times of antiquity during the eras in which the Roman and Islamic Empires dominated, continuing on to look at the abolition of the slave trade, the origins of contemporary global trafficking practices, and the application of slavery to exploit individuals, removing their freedom through ownership. This part will also illustrate the emergence of recognition of the crime of human trafficking by examining international treaties and conventions that addressed it in the early 20th century. The development of these laws reveals numerous attempts to alter their coverage, to reflect changing circumstances and the limitations in preceding agreements.

Chapter 2 will deal with the definition of human trafficking in the international law in general; Saudi Arabia and the UK are active members of the UN and the ILO, and other regional agencies. The UK and the KSA have regard to the guidelines of these international and regional organizations in order to develop policies and practices

related to human trafficking and modern-day slavery. All the definitions concur that the fundamental element of human trafficking is organized crime.¹³²

The chapter focuses on providing a modern view to the problem of human trafficking with review of relevant literature. It takes into account various controversies regarding the subject and explains all sides of the argument. The chapter introduces the elements of human trafficking and their interrelationship, namely, action, means and purpose. The action element deals with practices of recruitment, transfer, transportation, harbouring and receipt of persons. The means element discusses coercion, abduction, fraud, deception and abuse of power. The purpose element is explored separately in detail, revealing sexual exploitation, labour exploitation and removal of organs as the main purposes of human trafficking. Each section is explored in depth so as to prevent any confusion that may arise due to variations in laws between different countries. After reviewing these parts the chapter examines the issue of transnational crime, which is considered the fourth element,¹³³ and its distinction from international crime. This chapter emphasizes the fact that human trafficking is a multi-faceted criminal activity carried out by structured criminal organizations; therefore, it is important to construct a legal framework aimed towards combating this crime. This legal framework is discussed in order to provide a strong insight into trafficking and its prevention.

Chapter 3 will discuss the modern aspects of human trafficking in the context of other modern crimes, using the chief concepts set out in the UN Trafficking Protocol. In the first section, the discussions presented are based on the link between human trafficking and related concepts. The discussion assesses the connection between trafficking and chattel slavery, and then contrasts it with the definition of human smuggling, as mentioned in the Protocol against the Smuggling of Migrants by Land,

¹³² Although individual cases of trafficking involving individual a victim and an accused may not strictly comply with organized crime provisions of UN conventions/the Palermo Convention, more often than not the accused are running organized rackets of trafficking, thus making the crime eligible for trial under 'organized crime' law.

¹³³ 'having a transnational character ... either where it is committed, planned, or controlled, or where its effects are felt': James C Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49(1) *Va J Intl L* 1, 9-10.

Sea and Air 2000¹³⁴ (UN Smuggling Protocol), with which it is often confused. It is important to understand these connections, because human trafficking is a socially unacceptable illicit offence that has become increasingly dangerous, owing to its link with other activities, such as migration. Therefore, there is a need to develop extensive regulations for both victims and traffickers.

Then, this chapter explains the connection between human trafficking and labour migration, in light of appropriate information. It addresses recent issues involving social networking, human rights, money laundering, and organized crime. Many of the issues being raised in this chapter will not be analysed in depth in the rest of the thesis due to pressures of time and word count, but could be revisited by future researchers. The purpose of this chapter will be to demonstrate the effect of such modern-day issues on human trafficking. It also shows the issues faced when penalizing criminals involved in trafficking in the KSA and the UK.

Chapter 4 will analyse the provisions of the legal system with respect to the protection of trafficked victims. Special emphasis will be on the safeguarding of the human rights of the trafficked victims at European and international levels together with a major focus on domestic binding instruments.¹³⁵ Discussed in this chapter will be the ECHR¹³⁶ and the COE Convention on Action against Human Trafficking.¹³⁷ These two are the most valuable tools to help safeguard the victims of human trafficking from the criminals involved in this activity. Also assessed in this chapter will be the degree to which the Geneva Convention serves to safeguard the rights of residents, refugees, and the victims of human trafficking.

¹³⁴ United Nations Smuggling of Migrants Protocol (adopted 15 November 2000, entered into force 28 January 2004) UN Doc A/RES/55/25, Annex III: 'Smuggling of migrants' shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

¹³⁵ Other international instruments referring to trafficking in human beings include: the 1910 International Convention for the Suppression of the White Slave traffic; the 1921 Convention for the Suppression of Traffic in Women and Children; the 1926 Slavery Convention; UN Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others; the 1966 International Covenant on Economic, Social and Cultural Rights; the 1976 International Covenant on Civil and Political Rights; and the 1979 Convention on the Elimination of All Forms of Discrimination against Women.

¹³⁶ COE, CETS No 005, 4 November 1950 (entered into force 3 September 1953).

¹³⁷ Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings* (16 May 2005, CETS 197) <<http://www.refworld.org/docid/43fded544.html>> accessed 23 June 2015.

Chapter 5 will continue examining the legislative efforts mentioned but in the UK. Subsequent to this, there will be an analysis of their national laws and their implementation, and the measures to protect victims from exploitation, to identifying the shortcoming in KSA legislation and comparing that with the UK legislation. The purpose of this chapter is to analyse the national legislature of the UK with regard to human trafficking. It presents a comparative analysis between the legislature of the UK and the KSA based on combating human trafficking, penalizing the criminals involved and protecting the victims.

Chapter 6 will aim to analyse human trafficking from Saudi legal system perspective. This means that the chapter will analyse how and which Islamic rules strictly prohibit activities associated with human trafficking. In light of the Quran, Hadith (also called *Sunnah*), Ijma and Qiyas, this chapter will explore how Islamic commandments prohibit the act of human trafficking and the referred punishments for the various types of trafficking. The chapter will then move on to explain the Saudi judicial system and courts (Judiciary Law, Royal Decree No M/78 promulgated in 2007), showing the difference in litigation routes according to Islamic jurisprudence. The chief aim is to analyse the Islamic human trafficking laws and to demonstrate how Saudi law implements Islamic law in all judgments. The next section will presenting a number of profiles for the national case studies, including: statistics, causes, characteristics of the problem, and organized trafficking groups, to reflect the extent of the problem.

After this, the chapter evaluates the laws and policies concerning legal action against human trafficking offences in the KSA. This information provides a critical analysis of the measures adopted in three areas: national legislative efforts, government efforts, and protection of victims of trafficking, which are all deemed to affect action against trafficking in the KSA. Relevant case laws will be analysed to offer an assessment of the actual application of the law domestically. The purpose of this chapter is to benefit from the experience of the UK in anti-human trafficking.

Chapter 7 will examine the position of KSA and UK legislation in terms of the exploitation element in human trafficking for forced labour. The chapter will present and analyse measures to combat labour exploitation in Islamic law. Research on

original literature of international conventions together with the citation of law judgments will be carried out in order to understand and apply the meaning of international laws on forced labour. This chapter will also discuss and analyse the philosophy of the third element of the offence of human trafficking, which the exploitation element is regarding to forced labour, as an issue of the *mens rea* of a defendant when committing acts that comprise a trafficking offence, and explains how both national case studies deal with this. The chapter will use relevant cases to support the author's perspective of criminal intent (intention to exploit), and will prove how the KSA legislator has failed to achieve convictions in such cases where exploitation has not taken place when compared to the UK.

Chapter 8 is the general conclusion of the study. In this chapter, the study gave a comprehensive overview of the entire thesis and concludes by discussing the findings of the research. This includes answers to the various questions raised as well as the thematic areas of comparison and differences between the various legislations examined. The chapter also gave recommendations on the areas that need improvement with regards to legal and policy framework on human trafficking.

CHAPTER 2: DEFINITION HUMAN TRAFFICKING AT THE INTERNATIONAL LEVEL

2.1 INTRODUCTION

Around the world humans are involved in trafficking of other human beings, particularly women and children. As discussed in Chapter 1, human trafficking is an illegal act, a form of modern slavery¹ that involves the transfer of people for the purposes of sexual or physical labour or for the removal of victims' body organs. The acts of human trafficking involve forceful hiring, relocating, transporting, assembling and receiving the trafficked individuals. In the process of trafficking human beings (THB), countries can be involved in three different ways: as the country of origin of the victims, as the country through which the human trafficking victim is being transported, and as the country of destination.² According to a report by the United Nations Office on Drugs and Crime (UNODC) (2006), there are approximately 127 countries of origin, 98 transit countries and 137 destination countries.³ As well as occurring in all countries of the world, human trafficking takes all forms of labour imaginable.⁴ Trafficked persons are forced to beg, perform agricultural labour, sexual labour, and domestic servitude.⁵ The problem with addressing the issue of trafficking in persons is that there are few organizations working in this field, and access to relevant information is limited.

¹ Joachim Hagopian, 'Global Human Trafficking: A Modern Form of Slavery' (Global Research, 2014) <<http://www.globalresearch.ca/global-human-trafficking-a-modern-form-of-slavery/5377853>> accessed 11 September 2014.

² John Winterdyk and Philip Reichel, 'Introduction to Special Issue: Human Trafficking - Issues and Perspectives European' (2010) 7(1) Eur J of Criminology 5, 6.

³ UN Office on Drugs and Crime, *Trafficking in Persons: Global Patterns* (2006) 18-20, <http://www.unodc.org/pdf/traffickinginpersons_report_2006ver2.pdf> accessed 19 November 2012.

⁴ Melanie Orhant, 'Trafficking in Persons' in E Murphy (ed), *Reproductive Health and Rights: Reaching the Hardly Reached* (PATH 2002) 1-12.

⁵ *ibid.*

While there is disagreement between different transnational organizations about the number of people affected by human trafficking, an estimate suggests that approximately 700,000 to four million people are trafficked across borders each year.⁶

Trafficking often has its basis in poverty and in countries where there is a lack of employment opportunities for people (victims) who wish to find themselves a better life. Human trafficking not only occurs from poorer to wealthier countries but also within wealthier countries. People may be trafficked within the same country for various reasons and may have to rely upon those who facilitate their entry into the new country or for their mobility within that country. On arrival at the destination country, however, trafficked people are forced to work under slavery-like conditions.⁷ Bales stated that slavery has been a part of civilization from the beginning of human history. After legal slavery was abolished in the nineteenth century, researchers have used the word 'slavery' to define a wide range of activities, such as forced labour and prostitution, and even activities related to the selling of human organs. The definition of slavery varies across borders, which is evident from the fact that more than 300 international treaties have been signed, and none of them uses the same definition of slavery.⁸ THB, the modern form of slavery, is growing as a global problem, affecting the lives of millions of men, women and children.⁹ These trafficked individuals are trapped in countries other than their native countries. THB involves the transportation, transfer and recruitment of individuals through illegitimate means.¹⁰

This chapter deals with the definition of human trafficking in the international law in general; Saudi Arabia and the UK are active members of the UN and the ILO, and other regional agencies. The UK and the KSA have had regard to the guidelines of these international and regional organizations when developing policies and practices

⁶ US Department of State, *Trafficking in Persons Report* (June 2003) 3.

⁷ Gert Vermeulen, 'International Trafficking in Women and Children' (2001) 72(3) *International Review of Penal Law* 837, 841-842.

⁸ Kevin Bales, *New Slavery: A Reference Handbook* (ABC-CLIO 2004).

⁹ Alexis Aronowitz, 'Smuggling and Trafficking in Human Beings: The Phenomenon, the Markets that Drive it and the Organisations that Promote it' [2001] *European Journal on Criminal Policy and Research* 9, 163-195.

¹⁰ Europol, 'Europol Supports the Fight Against Modern Day Slavery (*Europol*, 30 July 2014) <<https://www.europol.europa.eu/content/europol-supports-fight-against-modern-day-slavery>> accessed 14 October 2014.

related to human trafficking and modern-day slavery. All the definitions concur that the fundamental element of human trafficking is organized crime.¹¹

The chapter focuses on providing a modern view on the problem of human trafficking with review of relevant literature. It takes into account various controversies regarding the subject and explains all sides of the argument. The chapter introduces the elements of human trafficking and their interrelationship, namely, action, means and purpose. The action element deals with practices of recruitment, transfer, transportation, harbouring and receipt of persons. The means element of the crime discusses coercion, abduction, fraud, deception and abuse of power. The purpose element is explored separately in detail, revealing sexual exploitation, labour exploitation and removal of organs as the main purposes of human trafficking. Each section is explored in depth so as to prevent any confusion that may arise due to variations in laws between different countries. After reviewing these parts the chapter examines the issue of transnational crime, which is considered the fourth element,¹² and its distinction from international crime.

2.2 DEFINITION OF HUMAN TRAFFICKING IN THE TRAFFICKING PROTOCOL

Recent research into human trafficking indicate that criminal organizations involved in conducting operations moving and mistreating migrants have become deeply entrenched.¹³ On 12 December 2000, the then EC (since replaced post-Lisbon Treaty 2009 by the EU) signed the UN Protocol to Prevent, Support and Punish Trafficking in Persons, Especially Women and Children. On 21 May 2004, the UN Convention against Transnational Organized Crime was joined by the EC and then later, on 6 September 2006, the UN Trafficking Protocol was established.¹⁴ This Protocol¹⁵ was considered a

¹¹ Although individual cases of trafficking involving an individual victim and an accused may not strictly comply with the organized crime provisions of UN conventions/the Palermo convention, more than often the accused are running organized rackets of trafficking, thus making the crime eligible for trial under 'organized crime' law.

¹² 'Having a transnational character ... either where it is committed, planned, or controlled, or where its effects are felt': James C Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49(1) *Va J Intl L* 1, 9-10.

¹³ Vermeulen (n 7) 884.

¹⁴ Council Decisions 2006/618/EC of 24 July 2006 on the conclusion, on behalf of the European Community, of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women

first step towards the establishment of a global definition of human trafficking¹⁶ as an international criminal offence according to various local laws,¹⁷ and it also highlighted the lack of protection provided to victims of trafficking.¹⁸

On 14 December 2000, the UK signed both the UN Protocol against the Smuggling of Migrants and the UN Protocol to Prevent, Support and Punish Trafficking in Persons, Especially Women and Children. The KSA signed them later on 10 December 2002.¹⁹

More detailed, article 3 of the UN Protocol adopts a relatively comprehensive explanation of human trafficking, in which ‘trafficking in persons’ means ‘the recruitment, transportation, transfer, harbouring or receipt of persons, by the means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability’.²⁰ This definition was adopted by the UN to deal with different matters related to human trafficking. It has been observed that before this Protocol came into existence, the definition of human trafficking varied among countries and NGOs.²¹ Countries facing this problem argued that the views of victims needed to be included in the definition of trafficking in order that their rights could be properly safeguarded. The rights of victims need to be upheld

and Children, supplementing the United Nations Convention Against Transnational Organised Crime concerning the provisions of the Protocol, in so far as the provisions of this Protocol fall within the scope of Articles 179 and 181a of the Treaty establishing the European Community [2006] OJ L262/44 and Council Decisions 2006/619/EC of 24 July 2006, Part III, Title IV of the Treaty establishing the European Community [2006] OJ L262/51.

¹⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons (UN Trafficking Protocol), especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime adopted by General Assembly Resolution 55/25 (entered into force on 25 December 2003) <www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> accessed 11 November 2012.

¹⁶ Janie Chuang, ‘Redirecting the Debate over Trafficking in Women: Definition, Paradigms and Contexts’ (1998) 11 Har Hum Rts J 65, 74-75.

¹⁷ K van Impel, ‘People for Sale: The Need for a Multidisciplinary Approach towards Human Trafficking’ (*International Migration*, Special Issue) 2000(1), 2000 IOM 113-130, 122.

¹⁸ Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart 2007) 123.

¹⁹ UN Office on Drugs and Crime, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime New York, 15 November 2000 <<https://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>> accessed 15 October 2014.

²⁰ UN Trafficking Protocol, art 3(a).

²¹ Janice G Raymond, ‘The New UN Trafficking Protocol’ (2002) 25(5) Women’s Studies Intl Forum 491, 494-495.

when they have experienced fraud, intimidation and the use of force.²² At the same time, international authorities could simply reject the pleas of those who had been trafficked by stating falsely that the travelling and labour recruitment was done with the agreement of the victims.²³ Moreover, even in cases where the victims apparently agreed to be smuggled or forced to work, the point could still be raised that they were not aware that they would experience such abuse, comparable to that of human slavery or forced labour and exploitation.²⁴ An individual smuggled into a different country may be subjected to exploitation and forced to work under harsh conditions. It has been agreed that criminals involved in smuggling people and later forcing them to work must be tried under the trafficking laws, even in cases where (for whatever reason) the victims have initially given their consent.²⁵ In a number of cases, it has been observed that in human smuggling, the relationship between the smuggler and victim comes to an end when the payment is made and the border is crossed.²⁶ Nevertheless, the issue remains as to why the UN Trafficking Protocol does not make provision for the consent of victims in certain cases.²⁷

A number of researchers have proposed that there is a significant difference between human smuggling and trafficking. Different from human trafficking, smuggling of people across borders involves consent between the people being smuggled and the smuggler;²⁸ it is a verbal agreement between the smuggler and the person being smuggled, which concludes with the arrival in the destination country. Smuggling of human beings across borders involves a critical network of people from different nations.²⁹ A number of individuals give consent to being smuggled in order to escape poverty, seek better employment opportunities and escape the after-effects of natural disasters or prosecution.

²² *ibid.*

²³ Kara Abramson, 'Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol' (2003) 44(2) *Harv Intl LJ* 473, 493.

²⁴ Vanessa E Munro, 'Stopping Traffic? A Comparative Study of Responses to the Trafficking in Women for Prostitution' [2006] 46(2) *Brit J Criminol* 318, 328.

²⁵ Abramson (n 23) 488.

²⁶ *ibid.*

²⁷ *ibid* 496.

²⁸ See further discussion in Chapter 3.

²⁹ Matilde Ventrella, *The Control of People Smuggling and Trafficking in the EU: Experiences from the UK and Italy* (Ashgate 2010 and 2013) 52.

People who are trafficked are termed ‘victims’ or ‘survivors’; in contrast, people who are smuggled allow themselves to be so for the aforementioned reasons.³⁰ Smuggling protocols in different countries provide minimal references to the protection of smuggled persons; however, trafficking protocols are designed to protect people being trafficked through different measures. Thus, it is clear that scholars have highlighted the concept of coercion and consent as the most important difference between human trafficking and human smuggling.³¹ A definition of human trafficking that turns on labour exploitation and its implications (ie forced labour or labour that contravenes established labour rules and policies)³² is used in order to avoid the issue of victims’ agreement altogether, and to focus attention solely on the prevention of trafficking and the protection of victims.³³ Saudi Arabia has clear laws related to labour and the work environment; moreover, there exists a difference between the laws for Saudi citizens and expatriates.³⁴ Conversely, corruption, abuse and coercion generally lead to an increase in issues that maximize the likelihood of encouraging people to become victims of this crime. In Saudi Arabia, the Tenders Law of Saudi Arabia, which was approved in 2004, has been able to make the publication of tenders more transparent and their procurement more systematic.³⁵ However, the laws related to abuse are different for men and women in Saudi Arabia. In order to protect the rights of women and the more vulnerable sections of society, Royal Decree No 11471 was established under the National Family Safety Program.³⁶ It includes protection against family coercion or an individual’s lack of funds.³⁷

There is no guarantee of a safeguard in the UN Trafficking Protocol³⁸ for individuals who fall victim to trafficking in order to improve their living conditions. Thus, the act of

³⁰ Kimberly A McCabe, *The Trafficking of Persons: National and International Responses* (Peter Lang 2008).

³¹ Ventrella (n 29) 173.

³² Abramson (n 23) 499.

³³ *ibid* 500; Kadriya Bakirci, ‘Human Trafficking and Forced Labour: A Criticism of the International Labour Organisation’ (2009) 16(2) *Journal of Financial Crime* 160, 164.

³⁴ Labour Law, Royal Decree No M/51 (2006)

<http://www.sagla.gov.sa/Documents/Laws/labor_law_en.pdf> accessed 15 October 2014.

³⁵ Peter North and H Tripp, *CultureShock! Saudi Arabia: A Survival Guide to Customs and Etiquette* (Marshall Cavendish International Asia Pte Ltd 2009).

³⁶ Sherifa Zuhur, *Saudi Arabia* (ABC-CLIO 2011).

³⁷ Munro (n 24) 330.

³⁸ *ibid*.

coercion must not only constitute psychological or physical abuse, but must also include factors such as reduced income or working circumstances that force people to become victims to trafficking.³⁹ The matter becomes more serious when the basic rights of these individuals require protection; economic migrants do not require as much security as the victims of trafficking.⁴⁰ It is impossible to remove economic issues from the meaning of human trafficking; it is frequently this factor that is most often exploited by the traffickers.⁴¹

A further issue with this particular definition is that it establishes a connection between the act of transfer and recruitment, and the exploitation of the victim. The victim first needs to be moved to a different location with the intention of being economically exploited by the traffickers. It is not easy to prove that this recruitment 'was for any purpose of exploitation' in the beginning, or at any other time.⁴² The actual crime or exploitation may only begin when the immigrant finds him/herself in the custody of strangers in an unfamiliar environment. The question is therefore whether a scenario in which the intention was not that of trafficking can be regarded as exploitation of the immigrant. It is this failure in the definition of human trafficking that reduces the possibility of a criminal prosecution being brought against the traffickers, particularly in cases of forced labour.

The UK⁴³ and Saudi Arabia⁴⁴ considered the aforementioned definition⁴⁵ of human trafficking to comprehensively improve certain conventions to address the issues related to transnational human trafficking, in the United Nations Convention against

³⁹ Conny Rijken, *Trafficking in Persons; Prosecution Form; A European Perspective* (TMC Asser Press 2003) 87.

⁴⁰ Lina A Malone, 'Economic Hardship as Coercion under the Protocol on International Trafficking in Persons by Organised Crime Elements' (2001) 25 *Fordham Intl LJ* 54, 54.

⁴¹ Rijken (n 39) 63.

⁴² Harald Haugom Olsen, 'The Snake from Fujian Province to Morecambe Bay: An Analysis of the Problem of Human Trafficking in Sweated Labour' (2008) 16(1) *Eur J Crime Crim L & Crim Just* 1, 26.

⁴³ *UK Action Plan on Tackling Human Trafficking* (2007) 3 <[http://www.parliament.uk/briefing-papers/sn04324 .pdf](http://www.parliament.uk/briefing-papers/sn04324.pdf)> accessed 16 May 2013.

⁴⁴ The law of the KSA adds two further elements to the UN definition of exploitation. These two elements are begging and medical experiments, (The KSA 2009 Trafficking Law, 2009) <www.protectionproject.org/wp-content/uploads/2010/09/Saudi-Arabia_TIP-Law_2009_Combined.pdf> accessed 24 October 2012.

⁴⁵ See Chapter 1.

Transnational Organized Crime (UN TOC) held in 2000. Below is a detailed account of trafficking activities being used and the general process involved.

2.2.1 Understanding Human Trafficking in the Trafficking Protocol

It is noteworthy that prior to accepting the final draft of the Protocol, the NGOs and states had not mutually agreed upon a definition for trafficking. The involved states and NGOs were extremely troubled by human trafficking. Issues concerning 'force' and 'consent' had led to much debate amongst states.⁴⁶ Disagreement arose concerning labour exploitation, particularly in regard to the fact that it could be voluntary. Hence, the inclusion of 'force' and 'consent' in the international definition of trafficking remained unclear.⁴⁷ Specially, in terms of the cases of exploitation, it was debated whether lack of consent should be a necessary part of the definition⁴⁸

Also, countries of human trafficking origin view 'consent of a victim' as being irrelevant; otherwise, it would be difficult to offer protection to those who failed to prove that they had been coerced or threatened into being trafficked.⁴⁹ In addition, other states would be able to deny the refuge of victims on the basis of the victim's consent to being transported.⁵⁰

In regard to victims having consented to being trafficked or working across borders, it could still be argued that they might not have agreed to slavery or being subjected to forced labour. It was mutually agreed, at the session in which the final draft of the Protocol was accepted, that even if the victims had agreed to exploitative conditions, the traffickers must be punished.⁵¹

⁴⁶ UNGA, Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (1 January 2000) UN Doc A/AC.254/Add.3/Rev.5, para 34.

⁴⁷ Raymond (n 21) 494-495.

⁴⁸ UNGA, Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (19 July 2000) UN Doc A/AC.254/4/Add.3/Rev.7, para 10.

⁴⁹ *ibid.*

⁵⁰ Abramson (n 23) 493.

⁵¹ *ibid* 488.

Ultimately, after the session at the UN it was decided that a separate paragraph be added regarding 'consent' to the definition of trafficking.⁵² According to article 3(a), consent of the victim held no relevance where any form of coercion set out in article 3(a) had taken place. While the possibility remained as to consent being given regarding exploitation, it avoided the issue whether the act of forced labour or prostitution in itself had an element of force in it.⁵³

Labour exploitation has been defined as illegal work or legal work that is contrary to current labour laws. This definition has been viewed as a way to avoid bringing in the matter of consent to the issue and to focus on the prevention of trafficking and protection of victims.⁵⁴ However, if a lack of consent is necessary, limitations such as violence, threats or fraud might take other reasons that result in trafficking out of the focus, such as poverty and family problems. Therefore, the Trafficking Protocol cannot safeguard trafficked migrants that were transferred of their own will in order to improve their living standards or quality of life. As a result, it was suggested that the term 'coercion' be widened to include not only physical or psychological violence but also other factors such as low pay and poor working standards.⁵⁵ If poverty was included as a form or factor of coercion in the definition of trafficking, it would become exceedingly difficult to distinguish between victims of human trafficking and refugees resulting from economic conditions.

Adding to the previous discussion, it is noted that economic refugees are not awarded the same protection as victims of trafficking.⁵⁶ However, it would not be wise to completely exclude economic circumstances from the definition, for such people can be vulnerable and be exploited by traffickers. Additionally, in cases where the victims have been deceived by the traffickers using false promises, it becomes difficult to prove that coercion has taken place, at the time of recruitment or transport, and as

⁵² UN Trafficking Protocol, art 3(b).

⁵³ Conny Rijken and Vincent Kronenberger, 'The United Nation Convention on Transnational Organised Crime and the European Union' in Vincent Kronenberger (ed), *The European Union and the International Legal Order: Discord or Harmony?* (TMC Asser Press 2001) 503-505. The prohibition of slavery on the other hand indicated that the addition of this paragraph emphasize that prostitution is a force practices in itself.

⁵⁴ Bakirci (n 33) 164. It always happens with workers to get more money in short time.

⁵⁵ Rijken (n 39) 87.

⁵⁶ Malone (n 40) 91-94.

such the intentions of the trafficker have to be considered. This intent is hard to prove where exploitation has not yet taken place and the victim has consented to being trafficked. Factors such as coercion, use of force, deception or abuse of a position of vulnerability or of power are not significant issues,⁵⁷ whereas consent still remains one. By way of example, in the UK (English) case of *R v Ramaj and Atesogullari*, the issue of the victim having consented was evident because of her inexperience,⁵⁸ and the Court of Appeal Criminal Division continued to prolong the matter because of the issue of consent, which as per the UN Trafficking Protocol is deemed irrelevant.

A further impediment by definition arises from the fact that it assumes a relationship between, *inter alia*, transport, recruitment, transfer and the purpose of exploitation. Consequently, the trafficked person must be transferred or transported with the intent of being exploited economically or sexually. The actual purpose of recruitment may, however, remain difficult to prove; in fact, the intent of exploiting the victim can hardly be confirmed at this stage at all.⁵⁹ This can be seen in cases where other people apart from the trafficker are involved in the trafficking process, and for all the trafficker knows, he is simply providing passage to people who wish to leave their homeland to move to a better place. Exploitation in such instances may even be initiated by people, in the country of destination, who have no link with the trafficker. In such cases, it must be questioned whether the offence can be established when the actual motive for the transportation did not include any form of exploitation. This has proved to be a hindrance and is the reason why so few traffickers are actually convicted, especially within the framework of forced labour.⁶⁰

Almost all analysis, whether by international instruments or legal commentators, discuss the definition of trafficking in three parts:⁶¹ the acts (including the recruitment,

⁵⁷ Klara Skrivankova, 'United Kingdom' in Global Alliance Against Traffic in Women (GAATW) (ed), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World* (GAATW 2007) 204-205.

⁵⁸ *R v Ramaj and Atesogullari* [2006] EWCA Crim 448, para 7.

⁵⁹ Olsen (n 42) 26.

⁶⁰ One of the attempts made by commentators to define human trafficking as a result of problems raised by the UN definition was Rijken's definition. He suggests: 'Trafficking in persons, means all acts involved in the coercive transnational recruitment and/or transportation of a person for forced exploitation.'; Rijken (n 39) 87.

⁶¹ Vivienne O'Connor and Colette Rausch, *Model Codes for Post-Conflict Criminal Justice* (Endowment of the US Institute of Peace 2007) 241; Alexis A Aronowitz, *Human Trafficking, Human Misery: The Global*

transfer, transportation, receipt or harbouring of persons); the means utilized to commit the said acts (including the use of force or threats or other forms of coercion, fraud, deception, abduction, abuse of power or position of vulnerability or the transfer of payments or benefits to obtain consent to acquire control over another person); and the purpose of the said acts (including exploitation or prostitution or sexual exploitation in other forms, slavery or similar practices, servitude, forced labour or services, or removal of organs). However, certain authors have included 'transnational crime' as a fourth element of the definition.⁶² The presence of these three elements (namely, action, means and purpose) are a prerequisite to a case being recognized as trafficking, and for the application of UN Trafficking Protocol and the UN TOC Convention within a given situation. However, an exception to this prerequisite is trafficking in children. The 'means' criteria are omitted when it comes to trafficking in children.⁶³ Therefore, cases involving children where an element of action exists, the purpose of which is the child's exploitation, will fall under the category of child trafficking. It is because of this exception (where it is not necessary to show the 'means') that identification of trafficked children and their exploiters becomes far easier than it is for adult victims.

However, even with a seemingly comprehensive definition, a list of forms of exploitation, including forced labour, is not provided by the Protocol. Some international instruments, discussed later within this chapter, have defined some types of exploitation. The UN includes forced labour, sexual services and removal of organs within its definition, but on to state that it recognizes all forms of trafficking. This researcher recommends, after analysing the definition of trafficking legally, that the terms encompassed in the definition need to be elaborated.

Trade in Human Beings (Greenwood 2009) 1; Robert Reed and Jim Murdoch, *Human Rights Law in Scotland* (3rd edn, A&C Black 2011) 423.

⁶² See Hathaway (n 12).

⁶³ UN Trafficking Protocol, art 3(c).

2.3 THE ACTION OF TRAFFICKING

According to the UN, 'Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use by force or other forms of coercion, of abduction, of fraud, of deception ...'.⁶⁴

The element of 'action', while being first of the three elements of adult human trafficking, is the sole element in trafficking of children. A number of activities fall within this element, including, but not limited to, acts of recruitment, transfer, transportation, receipt or harbouring of persons. An action by itself may be neutral, but when combined with particular 'means' to exploit a 'purpose' may assume a different character. The available material is lacking in guidance in regard to how these terms should be interpreted and applied.⁶⁵ However, the COE/UN Study on Trafficking in Organs⁶⁶ has attempted to help clarify and present the possible extent of these terms.⁶⁷

'Recruitment' is defined in the UN Trafficking Protocol as placing people under control so that they may be exploited at a later stage. Furthermore, the means used for recruitment were enumerated by the 1910 White Slave Convention. The term 'recruitment' is understood to mean allurement or encouragement of a person in order to perform a specific activity, and especially in trafficking cases, the use of coercive or non-coercive means. The conventional interpretation of recruitment does not pose any problem because it was based on a direct interaction between the victim and traffickers or their brokers; however, in modern times, the concept has widened to include the use of the Internet and social networks through intermediaries. With the increasing use of the Internet, a broader audience is available.⁶⁸ Hence, the traffickers are presented with a wide range of effective and unrestricted access to recruitment of victims. Victims are easily deceived by online employment, with these scams being advertised via simple pop-ups, search engines, chat rooms and spam mails.

⁶⁴ UN Trafficking Protocol, art 3(a).

⁶⁵ Anne T Gallagher, *The International Law of Human Trafficking* (CUP 2010) 29.

⁶⁶ COE and UN, *Study on Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (COE 2009).

⁶⁷ *ibid* 78.

⁶⁸ See further discussion in Chapter 3.

Furthermore, social networking tools including Facebook, MySpace and Twitter have gained popularity as recruitment tools. The victims who are looking for friendship or jobs are 'groomed' and when an opportunity presents itself, they are trafficked.⁶⁹

The EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016⁷⁰ holds online recruitment of the victims as one of its highest priorities⁷¹ referring to it under the heading of 'traditional crime on electronic network'.⁷² Recruitment of trafficking victims over the Internet may be considered a new means of trafficking, but not a new form.⁷³ Advertising in print or in digital form, as in over the Internet, widened the scope for the traffickers to achieve their criminal goals. A good example is labour or sexual exploitation, where the difference between recruiting people for pornography and those for other sexual activities is that in the former case it is not compulsory for the recruits to leave their native countries, whereas in the latter case they are often trafficked internationally.

'Transportation' is said to include the movement of persons both within and across borders.⁷⁴ The term 'transfer' means the delivery of a trafficked victim from one person, or trafficker, to another and this may occur either within or across the border. For instance, a parent may transfer their child to the trafficking perpetrators. 'Harbouring', or receipt of persons, is understood to mean custody or control of a trafficked person by another during their transport or the exploitation.⁷⁵ It is widened

⁶⁹ Mark Latonero and others, 'Human Trafficking Online: The Role of Social Networking Sites and Online Classifieds' [2011] University of Southern California Annenberg, Centre on Communication Leadership & Policy 14.

⁷⁰ EU, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2012) 286 final (19 June 2012).

⁷¹ *ibid* s 2.5, Priority E, 14.

⁷² Maria O'Neill, 'Trafficking in Human Beings and the Online Environment: A view of the EU Legal Framework' (Human Trafficking and Online Networks Workshop 'Scottish Crucible and the Dundee University Space and Society Research Group', Dundee, September 2013).

⁷³ Athanassia P Sykiotou, *Trafficking in Human Beings: Internet Recruitment* (COE 2007) 26 Council of Europe
<https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/trafficking_in_human_beings_internet_recruitment_1.pdf>
accessed 15 September 2014.

⁷⁴ Ines Staiger, 'Trafficking in Children for the Purpose of Sexual Exploitation in the EU: The Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings and its Implementation into German Law' (2005) 13(4) *Eur J Crime Crim L & Crim Just* 603, 606.

⁷⁵ *ibid* 606.

to include providing information towards the action to be performed by the trafficked person.⁷⁶

The key⁷⁷ factor in establishing the extent of the Trafficking Protocol's definition is the 'action' element. As an example, the UN 1949 Trafficking Convention attempted to prevent the process (such as procurement) and the result (ie the exploitation of forced labour and prostitution). As per the definition of the Trafficking Protocol, it is of merit to consider whether it only deals with the previous attributes or it includes the nature of the result. Further, adding certain terms, including harbouring and receipt, to the action category transpired to be of great importance. Introducing the terms and providing substantial references alongside them proved not only to encompass the process but also succeeded in including the final point of human trafficking.⁷⁸ What the text meant was that possession of a person by any means, such as buying, with the intent of exploiting them through any means, would fall within the trafficking definition. Similarly, keeping a person in an exploitative position via any means would also qualify as trafficking. Expanding the element of 'action' resulted in not only in inclusion of the usual perpetrators such as recruiters, transporters and brokers but also managers, owners, or controllers of brothels or household or other places where any exploitation took place.

There is the possibility that the trafficking concept may be widened to include exploitative situations that involve no prior process. By way of example, a previously normal working place that is changed to an exploitative one (most particularly in cases of intergenerational bonded labour) could fall within trafficking as one without any prior process. Even though in this example there had been no instance of trafficking people into an exploitative environment, it could be argued that the position can still be deemed trafficking since the victims were being harboured, irrespective of the means employed. Such a conclusion was reached in the definition of trafficking;

⁷⁶ COE and UN, *Study on Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (n 66) 78.

⁷⁷ Gallagher (n 65) 29.

⁷⁸ *ibid.*

however, the initial draft of the Travaux Préparatoires⁷⁹ does not seem to support this conclusion. If all the positions of forced labour exploitation were included under harbouring, then the three-part definition of trafficking would become redundant.

In conclusion, if one or more acts fall within the 'action' category, then the incidence will be termed a human trafficking crime. Presenting all of the acts is not necessary. Human trafficking is said to have occurred when people have been recruited, from the start, either in the country of origin or destination, or during the transfer or transportation either within a country or across a border, or during the process of harbouring or reception, providing that the action was for the purpose of exploitation.

2.4 THE MEANS OF TRAFFICKING

According to the UN, '... by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person'.⁸⁰

The 'means' is the second element in human trafficking. It includes coercion, force, fraud, deception, abduction, abuse of power or other person's vulnerable state, or the exchange or payment or gifts to acquire consent of a person to give control over them to someone else. This element has relevance in cases pertaining to adult trafficking. This part of the definition is in congruence with the earliest trafficking instruments, which demonstrates that people can be trafficked to an exploitative environment by application of force or by less direct ways such as lies and fraud. The majority of the 'means' employed as per the definition of trafficking are relatively straightforward and some occur in conjunction; however, some have caused controversy and will be discussed in this section.

⁷⁹ The travaux préparatoires: meaning a preparatory work which used to describe documentary evidence or treaty text.

⁸⁰ UN Trafficking Protocol, art 3(a).

First, the term ‘coercion’ is deemed highly important to the idea of human trafficking, given that it is the core factor that provides the theoretical as well as legal distinction from similar acts such as migrant smuggling.⁸¹ ‘Coercion’ is not a singular entity and includes a range of terms and behaviours that cover threats, violence and deceit.⁸² After paying sufficient attention to the trafficking definition, one realizes that a link exists between coercion and threat and use of force. This separates means into direct and indirect forms, which are utilized to move or keep the trafficking victim under conditions of exploitative nature, which always occurs in cases of forced labour. Examples of indirect means include fraud and deception pertaining to the nature of work that has been promised and/or to the working conditions that the person will have to face. For instance, in the UK (England) *Nualpenyai* case,⁸³ the trafficker recruited two girls from Thailand to work in brothels in the UK. Even though the girls had consented to coming to work in the UK, sufficient proof existed that their passports had been forcefully taken from them. They were forced into a position where they had no option but to do whatever was asked of them.⁸⁴ There still exists a debate concerning the extent of fraud, coercion, or deception (which are considered means), and this leaves room for interpretation further than what was intended by the drafters.⁸⁵ For example, it was debated whether coercion included not only psychological and physical compulsions but also excessive financial pressures.⁸⁶

Another part that has been subject to controversy is the ‘abuse of power or of a position of vulnerability’. It is considered to be another means through which victims that have been through recruitment, transfer, receipt and such are sent into exploitative conditions. The phrase ‘abuse of power’ has appeared in international conventions (for example, the 1910 White Slave Convention) before being

⁸¹ See further on this issue Chapter 3.

⁸² For example, at the Committee of Ministers ‘Recommendation Rec(2000)11 the ‘coercion, in particular violence or threats, deceit, abuse of authority or of a position of vulnerability’. COE, Committee of Ministers ‘Recommendation No R (2000) 11 of the Committee of Ministers to Member States on Action against Trafficking in Human Beings for the Purpose of Sexual Exploitation’ (19 May 2000) para 1.

⁸³ *Regina v Atchara Nualpenyai* [2010] EWCA Crim 692.

⁸⁴ *ibid* para 22.

⁸⁵ Gallagher (n 65) 31-32.

⁸⁶ Malone (n 40) 55.

reintroduced by the Trafficking Protocol.⁸⁷ The exact meaning of the phrase was the subject of dispute during the drafting of the Protocol, as evident from the lack of exact definition of abuse of power in either the Trafficking Protocol or the Travaux Préparatoires.⁸⁸ The term 'abuse of authority' was intended to include the power that male family members enjoyed over female family members and also power that parents had over children in some legal systems.⁸⁹

The UN Trafficking Protocol expresses a special idea of the 'abuse of a position of vulnerability'. According to the content of the Travaux Préparatoires, it is stated that this phrase is used in situations that are so abusive that the victim has no chance of escaping without agreeing to exploitation.⁹⁰ Given the fact that no other form of detail is present pertaining to this matter, the use of this piece of information in further discussions will be a good choice. An example is the Explanatory Report to the COE Trafficking Convention⁹¹ (COE Explanatory Report). The content of this Report goes beyond the Trafficking Protocol. It attempts to deal with all types of mental, social, physical, and financial exploitation. It also includes cases where the victim becomes vulnerable due to his/her illicit administrative or financial position. Essentially, the Report includes all cases that force a person to submit to being exploited. Such acts are undoubtedly a breach of human rights and damage the victims' self-respect.⁹²

It is of assistance to shed light on the kinds of exploitation occurring at international levels. Misuse of authority and exploitation of the vulnerability of the victims appears over social, literary, physical, and financial platforms.⁹³ According to the UNODC Model Trafficking Law, there are certain pointers in national law that can be employed in order to identify the misuse of authority or exploitation of the vulnerability of victims. These include cases where the victim gains entry into the region using forged documents; the person is pregnant, disabled, or addicted to a particular item that affects his/her critical thinking skills; the person has agreed to give material or

⁸⁷ International Convention for the Suppression of the 'White Slave Traffic' 1910, art 2. See further discussion in Chapter 1.

⁸⁸ UNODC, *Model Law Against Trafficking in Persons* (UN 2009) 343.

⁸⁹ *ibid* 343.

⁹⁰ *ibid* 347.

⁹¹ COE, Explanatory Report on COE Trafficking Convention 2005.

⁹² *ibid* para 83.

⁹³ ILO, *Report on Operational Indicators of Trafficking in Human Beings* (ILO 2009) 3.

monetary returns to another individual who thus has authority over him/her; the person is not capable of making decisions due to a very young age, mental or physical sickness; and the person is in a socially unstable position.⁹⁴

The UNODC Model Trafficking Law suggests that, in the interests of safeguarding the rights of victims, it is better to pay attention to the mental state of the criminal, rather than that of the victim, in order to obtain a clear view of the prospective crime.⁹⁵ With the application of this suggestion, it would be easier to catch criminals on the basis of their intention of trafficking and exploiting, rather than waiting for the crime to be committed.⁹⁶

There is no accurate explanation of the phrase ‘the giving or receiving of payments or benefits to achieve the consent of a person having control over another person’, just as with the term ‘means’ as discussed above. An interesting fact to consider here is whether this phrase applies only to legal control of one individual over another (like that of a parent over their child) or whether it also applies to the authority of employers over employees (*de facto* control). This consideration is important because the two situations are not very different in terms of misuse of authority. Unfortunately, the UNODC Model Trafficking Law and the UNODC Legislative Guide and the content of the Travaux Préparatoires shed no light on this matter.⁹⁷ Thus, it can only be assumed that the phrase only applies to human trafficking.

As stated above, even a small amount of evidence based on the ‘means’ of trafficking will be sufficient to prove an act of adult human trafficking. It is not necessary to adduce evidence of every single ‘means’. However, in the case of children, the act of trafficking is considered a crime whether or not they were tricked or misled. Consequently, the law enforcement authorities are able to provide better protection

⁹⁴ UNODC, *Model Law Against Trafficking in Persons* (UN 2009) 9.

⁹⁵ *ibid* 9-10.

⁹⁶ Staiger (n 74) 607.

⁹⁷ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UN 2004).

to vulnerable children.⁹⁸ This allows for the punishment of traffickers, and a subsequent safeguarding of children.

2.5 THE PURPOSES OF TRAFFICKING

According to the UN, 'Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.'⁹⁹

The definition of trafficking includes a *mens rea* necessity to include the phrase 'for the purpose of'. The crime of trafficking is deemed to have taken place if the alleged trafficker had the intention of making use of illegal means for transporting persons, or in the case of adult victims, if the result of trafficking causes a specific outcome to occur. This outcome is known as a crime of special or particular intent in terms of human trafficking.¹⁰⁰ However, the crime will still have been committed even if the original intention was not achieved. Therefore, a significant outcome achieved is that human trafficking can still be deemed illegal even if no exploitation actually occurs.¹⁰¹ Thus, it is not wrong to say that exploitation is not a requirement to establish an act of human trafficking.

The Trafficking Protocol provides an exhaustive list of purposes of human trafficking. They have been listed in such a systematic way as to be unambiguous or require amendment to the domestic law. The intention behind the drafting of such a detailed list is so that the Protocol is ratified. The types of exploitation are set out below.

2.5.1 Sexual Exploitation

'Exploitation of the prostitution of others' is a phrase that has not been explained in the Trafficking Protocol with the intention that all states would ratify the Protocol,

⁹⁸ Joost Kooijmans and Hans van de Glind, 'Child Slavery Today' in Gary Craig (ed), *Child Slavery Now* (The Policy Press 2010) 27.

⁹⁹ UN Trafficking Protocol, art 3(a).

¹⁰⁰ UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners: Module 1: Definition of Trafficking in Persons and Smuggling of Migrants* (UNODC 2009) 5.

¹⁰¹ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UN 2004) para 33.

with no dependence upon their policies on the criminalization of prostitution.¹⁰² This is why the exploitation of prostitution has only been included in respect of trafficking, by the Protocol.¹⁰³ This is similar to the Convention on the Elimination of All Forms of Discrimination against Women 1979 (1979 EDAW Convention) and the UN 1949 Trafficking Convention.¹⁰⁴ 'Pimping'¹⁰⁵ is the term used to describe the exploitation of prostitution. It refers to taking advantage of those individuals who are involved in commercial sex,¹⁰⁶ including underage and involuntary prostitution¹⁰⁷ as well as children who are part of the pornography market.¹⁰⁸ According to the UNODC Model Trafficking Law, there are several definitions of the phrase 'exploitation of the prostitution of others' and it basically refers to obtaining illegal material or financial advantage from the act of prostitution of another person.¹⁰⁹ It is important to note that exploitation here differs from the idea of forced labour. Even though both acts involve taking material benefits, forced labour involves manual work, and prostitution involves sexual work, although some academic commentators, particularly those taking a feminist line of analysis, have used these words interchangeably.

Neither the UN Trafficking Protocol nor any other international convention provides a definition of sexual exploitation. In fact, this kind of exploitation was greatly debated when the Protocol was being drafted. Nevertheless, other kinds of exploitation have been defined in the Protocol. The debate regarding the phrase has been in terms of slavery, forced labour, and simple 'mail-order' brides.¹¹⁰ Interestingly, attempts have been made to understand the phrase 'sexual exploitation' with respect to the practices

¹⁰² UNODC, *Model Law Against Trafficking in Persons* (UN 2009) 14.

¹⁰³ UNGA, Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (3 November 2000) UN Doc A/55/383/Add.1, para 64.

¹⁰⁴ UN (adopted on 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

¹⁰⁵ Donald Titus, *Mackin' for Million\$* (AuthorHouse 2007) 127.

¹⁰⁶ Frédérique Delacoste and Priscilla Alexander, *Sex Work: Writings by Women in the Sex Industry* (2nd edn, Cleiss Press 1987) 198.

¹⁰⁷ Gert Vermeulen, *EU Quality Standards in Support of the Fight against Trafficking in Human Beings and Sexual Exploitation of Children* (Maklu 2007) 209.

¹⁰⁸ See further the Convention on the Rights of the Child 1989 (1989 CRC), 1577 UNTS 3 (adopted by General Assembly resolution 44/25, 20 November 1989, entered into force 2 September 1990); Optional Protocol to the Child Convention on the Sale of Children, Child Prostitution and Child Pornography 2000, 2173 UNTS 222 (adopted by General Assembly resolution 54/263, 25 May 2000, entered into force 18 January 2002).

¹⁰⁹ UNODC, *Model Law Against Trafficking in Persons* (UN 2009) 13.

¹¹⁰ Terry Coonan and Robin Thompson, 'Ancient Evil, Modern Face: The Fight Against Human Trafficking' [2005] 6(1) *Geo J Intl Aff* 43, 46.

and actions involved therein. According to most people, this kind of exploitation is a clear violation of human rights and respect as it misuses the social, moral, physical, and mental capability of a person. It is inclined towards the misuse of authority pertaining to social, financial, emotional, and sexual standards.¹¹¹ There is debate concerning which clear forms of sexual exploitation cannot be proved or clearly shown,¹¹² such as in the case of 'mail-order' brides. There is also debate concerning the people involved in receiving these services and whether or not their involvement (as sexual clients) is legal or illegal.

A noticeable fact is that the UN Trafficking Protocol does not state its stance on mail-order brides; neither does it place any obligations on the member states regarding this issue. On the other hand, the COE Trafficking Convention does expect the member states to label the 'clients' as criminals, since they continue using these sexual services in spite of the knowledge that the people providing the services are the victims of trafficking.¹¹³

Sexual exploitation is an issue that poses problems when it is applied to adults, due to differing ethical and religious standards adopted, and approaches to crime control informing the national laws of different member states. Even within the EU there are widely differing approaches to crime control surrounding prostitution. The concept of exploitation through prostitution and such activities are more overtly applied to children in the international laws,¹¹⁴ with most countries prepared to adopt the same standards with regard to the protection of children. However, a definition has been created using information from different sources¹¹⁵ (Japan being an exception, as seen

¹¹¹ RakhaWazir and Nico van Oudenhoven, *Child Sexual Abuse: What Can Governments Do? A Comparative Investigation into Policy Instruments used in Belgium, Britain, Germany, the Netherlands and Norway* (Martinus Nijhoff 1998) 35-36.

¹¹² Barbara Sullivan, 'Trafficking in Women: Feminism and New International Law' (2003) 5(1) *Intl Fem JP* 67, 81.

¹¹³ Art 19.

¹¹⁴ CRC 1989, art 34; Optional Protocol to the Child Convention 2000, art 3.

¹¹⁵ At one stage in the negotiation process, the rolling text contained a definition of sexual exploitation. It states: "'Sexual exploitation" shall mean: (i) of an adult, [forced] prostitution, sexual servitude or participation in the production of pornographic materials, for which the person does not offer himself or herself with free and informed consent; (ii) Of a child, prostitution, sexual servitude or use of a child in pornography': UNGA, Sixth Draft of the Trafficking Protocol, (4 April 2000) UN Doc A/AC.254/4/Add.3/Rev6, art 2 bis (b)(i)(ii).

in the case of banning child-porn¹¹⁶). The Trafficking Protocol, as mentioned previously, offers disagreements regarding this phrase. In fact, there are groups that have even suggested the removal of this phrase from the definition of human trafficking, owing to its lack of precision. Similarly, the Special Reporter of the UN has also stated that this phrase has several different interpretations which make its original meaning ambiguous. For instance, it is still under discussion at a global level as to whether it is appropriate to add the concepts of forced labour, the sex industry, and slavery under the heading of sexual exploitation. A suggestion by the NGO International Human Rights Networks (IHRN) followed by the Coalition against Trafficking in Women (CATW) stated that all kinds of human trafficking for prostitution should be terminated, regardless of the involvement of coercion in them.¹¹⁷ This is to say, the IHRN believes that every woman who becomes a part of prostitution is innocent, since this act is a strict violation of human rights.¹¹⁸ Not all feminist commentators would agree with this approach, with some, particularly those based in more liberal states on this topic, arguing that prostitution is valid work.

On the other hand, there are other groups that believe that including the phrase 'sexual exploitation' in the definition of human trafficking is important as it allows all legal bodies to devise a definition for the phrase according to their own legal system.¹¹⁹ As stated above, the real issue lies in whether human trafficking should include either forced and voluntary prostitution, or just one of them. According to the author, these variations in opinions are a result of political and historical inclinations of different law-making groups. Such inclinations have made it difficult to reach a global consensus on the matter. Thus, the UN via the Working Group on Trafficking in Persons (which supervises implementation of the Trafficking Protocol) eventually decided, by taking the ideas of the IHRN and the majority of the countries, that it is not necessary to include the phrase 'sexual exploitation' in the definition of human trafficking.¹²⁰ In

¹¹⁶ James Fletcher, 'Why Hasn't Japan Banned Child-Porn Comics?' (*BBC News Magazine*, 7 January 2015) <<http://www.bbc.co.uk/news/magazine-30698640>> accessed 15 February 2015.

¹¹⁷ Raymond (n 21) 493.

¹¹⁸ Askola (n 18) 33.

¹¹⁹ UNGA, Interpretative Notes for the Official Records (Travaux Préparatoires) of the Negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto (3 November 2000) UN Doc A/55/383/Add.1, para 64.

¹²⁰ UNODC, *Model Law Against Trafficking in Persons* (UN 2009) 342.

response to this, the UN Trafficking Protocol and the Travaux Préparatoires provide little explanation of the application of this matter in the Trafficking Protocol.

2.5.2 Labour Exploitation

An even more serious form of exploitation, particularly in the context of the KSA, is 'labour exploitation', which makes up a significant element of the illegal aspect of human trafficking. Reference is made to the conventional definition in the International Labour Organization (ILO) Forced Labour Convention 1930 (1930 ILO FL Convention), since there is no clear definition of forced labour in the UN Trafficking Protocol. There is also no clear definition for European countries in the COE Trafficking Convention.¹²¹ Forced labour encompasses all activities that an individual is compelled to undertake without his will and under threat of punishment.¹²² By using the word 'punishment', focus has been put on the use of compulsion, threats, etc.¹²³ Thus, forced labour is all about physically and mentally suppressing the victim to perform some work against his will,¹²⁴ by seizing his documents of identification, or getting involved in debt bondage.¹²⁵ Thus, it is the concept of force that labels the crime as being exploitative labour. In these cases, use of force is especially debatable when the victim has no choice but to submit to the use of force.

It is important to identify such people as being victims of human trafficking as the victims are often unaware of their position. Law-making authorities are also ignorant of the fact that force and compulsion are important determining factors of human trafficking,¹²⁶ which is particularly significant aspect in the comparative study of the UK and the KSA which will be discussed in Chapters 5 and 6.

¹²¹ ILO (C029) 53 UNTS 50 (11 October 1933, entered into force 24 August 1934).

¹²² Art 2(1).

¹²³ Gary Craig and others, 'Contemporary Slavery in the UK: Overview and Key Issues' [2007] Joseph Rowntree Foundation 16.

¹²⁴ Human Rights Watch (HRW), *Inside the Home, Outside the Law: Abuse of Child Domestic Workers in Morocco Report*, vol 17 (HRW 2005) 3.

¹²⁵ Organisation for Security and Co-operation in Europe (OSCE), *Report on the Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Identification-Prevention-Prosecution, Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Prosecution of Offenders, Justice for Victims* (OSCE 2008) 36.

¹²⁶ Craig and others (n 123) 17.

It is only possible to identify trafficking with respect to forced labour by shedding light on exploitation.¹²⁷ Thus, according to a document of the January 2010 session of the Working Group created to monitor the implementation of the UN Trafficking Protocol, labour exploitation with regard to human trafficking provides the formation of a link between the 1930 ILO Forced Labour Convention and the UN Trafficking Protocol.¹²⁸ This shows how important it is to highlight exploitation while dealing with this issue. Only after recognizing this factor is it possible to punish the criminals involved and protect the victims.

Moreover, the definition provided by the ILO has also been criticized for failing to properly explain the idea of forced labour and failing to suggest punishments for the criminals involved. Consequently, most countries have to rely on their domestic legislation to provide a definition, in the absence of a globally agreed definition.¹²⁹ The ILO Report mentions several methods that are employed in order to coerce victims into forced labour, including sexual torture, various forms of supernatural threats, physical violence, monetary penalties, condemnation of police and immigration for deportation, and removal from jobs and services.¹³⁰ Moreover, there are also other aspects that may evidence that the employee has been forced into working. These include, deceit, fake commitments regarding the nature of the job, failure to pay salaries, and withholding identity documents or other possessions of the victim.¹³¹

Exploitation is another term for forced labour, used to describe the situation where a person has been forcefully deprived of his/her basic human rights. In today's world, domestic labour is seen as one of the prominent examples of forced labour,¹³² as people are deprived of their basic rights by not being paid on time or enough,¹³³ and they can also be treated badly in other ways. According to the data recorded by the

¹²⁷ European Union, Experts Group, *Report of the Experts Group on Trafficking in Human Beings* (EC 2004) 16.

¹²⁸ The document adds, somewhat confusingly, that the inclusion of forced labour or other services in the definition 'makes clear that trafficking in persons for the purpose of exploitation is encompassed by the definition of forced or compulsory labour of the Convention': UNODC, *Analysis of Key Concepts of the Trafficking in Persons Protocol* (9 December 2009) UN Doc CTOC/COP/WG.4/2010/2, p 4.

¹²⁹ OSCE (n 125) 36.

¹³⁰ ILO, *A Global Alliance Against Forced Labour Report* (ILO 2005) box 1.1, p 6.

¹³¹ *ibid.*

¹³² ILO, *Stopping Forced Labour Report* (ILO 2001) 29.

¹³³ ILO, *Decent Work for Domestic Workers* (ILO 2010) 1.

advice agency Kalayaan, Migrant Domestic Workers (MDWs) work 17 hours per day, and their pay is approximately GBP 236 on arrival in the UK per month.¹³⁴ Most often, these workers were forced to follow the orders of their masters in an abusive manner. The most common reason behind their exploitation was that these workers did not have the right kind and degree of job security, and they also had no personal ties with their employers that could save them from abuse.¹³⁵

Using this information, it can be said that forced labour resembles slavery to a very high extent as the workers involved in forced labour are not afforded basic rights and proper remuneration, and they suffer from physical and mental coercion.¹³⁶ Another term that is used with regard to this issue is 'servitude', which is similar to slavery but has a wider definition. It is described as an act that deprives an individual of his basic rights of freedom, according to the European Court of Human Rights (ECtHR) in *Siliadin v France*. It also makes it mandatory on the 'serf' to take residence on the other's property and not wilfully change his status.¹³⁷ Nevertheless, contemporary cases such as *R v Tang*¹³⁸ and recent academic debates claim that this interpretation of this term is unnecessarily inflexible and rigid¹³⁹ and that such rigid meanings are likely to have a great effect on immigration laws and would also require a number of amendments to be brought within the scope of the term, which is a tedious task.¹⁴⁰

Another concept that does not take into account the entire meaning of the strict definition is that of 'chattel slavery' or 'legal ownership' of an individual. Instead, it is possible to include all the clauses and words of the definition to refer to *de facto* slavery,¹⁴¹ which came into being in the 1926 Slavery Convention, in the *Tang* case and

¹³⁴ NGOs Kalayaan and Migrant Domestic Workers Organisation (MDWs), 'Annual Report and Financial Statements' (London, April 2006-March 2007) (unpublished statistics) 7.

¹³⁵ ILO, *A Global Alliance Against Forced Labour Report* (ILO 2005) box 1.1, p 50.

¹³⁶ Kevin Bales, *Disposable People: New Slavery in the Global Economy* (University of California Press 1999) 39; Shashi Irani Kara, 'Decentralizing the Fight against Human Trafficking in the United States: The Need for Greater Involvement in Fighting Human Trafficking by State Agencies and Local Non-Governmental Organizations' (2007) 13 *Cardozo JL & Gender* 657, 657.

¹³⁷ *Siliadin v France*, Judgment [2005] 43 ECHR 16, para 123.

¹³⁸ *R v Tang* [2008] HCA 39.

¹³⁹ Holly Cullen, '*Siliadin v. France*: Positive Obligations under Article 4 of the European Convention of Human Rights' (2006) 6(3) *Hum Rts L Rev* 585, 591-592; Jean Allain, 'The Definition of Slavery in International Law' (2009) 52(2) *Howard LJ* 239, 273-275.

¹⁴⁰ Cullen (n 139) 591-592.

¹⁴¹ Allain (n 139) 273-274.

by the analysis of the Travaux Préparatoires.¹⁴² It can also be seen in the definition of slavery by the ICC in article 7(2)(c),¹⁴³ also supported by the ICC on analysis of article 1 of the 1926 Convention in the International Criminal Tribunal for the former Yugoslavia (ICTY) case of *Prosecutor v Kunarac, Kovac and Vukovic*.¹⁴⁴ While human trafficking as a war crime is not being covered in this thesis, some of the case law from that crime area is informative in addressing the issue of human trafficking as a transnational crime.

More often than not, the servant is viewed as belonging to a low class, for whatever reason. According to the ILO study, the chief characteristics of domestic labour include:

1. Female domestic workers are in the majority.
2. Foreign immigrants are in the majority.
3. Most people are living with their owners and working in private houses.¹⁴⁵

Thus, it is not wrong to say that forced services are a major threat to the concept of freedom. However, the ECtHR differentiated between forced labour and forced service in the case of *Siliadin*.

According to the Court, the facts of *Siliadin* included both servitude and forced labour. The victim was threatened using her illegal immigration status as a tool, which deprived her of the right to make her own decision as to whether she wished to work for her oppressors or not, and whether she was prepared to report the abuse to the national authorities. This way the notion of 'reluctance' was served by the case.¹⁴⁶ As for the case of satisfying servitude, the individual was also forced to live in the

¹⁴² Jean Allain, *The Slavery Conventions: The Travaux Préparatoires of the 1926 League of Nations Convention and the 1956 United Nations Convention*, vol 1 (Martinus Nijhoff 2008) 54-57.

¹⁴³ See further discussion in ch 1, art 7(2)(c): 'Enslavement' means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.'

¹⁴⁴ *Prosecutor v Kunarac, Kovac and Vukovic* [2001] IT-96-23-T & IT-96-23/1-T, 117-118.

¹⁴⁵ Adelle Blackett, 'Making Domestic Work Visible: The Case for Specific Regulation' (1998) Labour Law and Labour Relations Programme Working Paper No 2/1998.
<<http://www.ilo.org/public/english/dialogue/ifpdial/publ/infocus/domestic>> accessed 15 November 2013.

¹⁴⁶ *Siliadin v France*, Judgment [2005] 43 ECHR 16, paras 118, p 32.

residence provided by her oppressor, by force.¹⁴⁷ The Court found that the victim was not provided with the required form of security by the French criminal law, and was subjected to servitude and forced labour, but not slavery.¹⁴⁸ Without doubt, this case provides valuable assistance in terms of labelling human trafficking as a crime. However, it does not provide assistance in terms of human rights and the safeguarding of victims.¹⁴⁹

Even though the UN definition of trafficking includes the act of slavery in terms of it being a kind of 'purpose', the definition provided by any other international legal body is equally acceptable.¹⁵⁰ There is a very significant link between slavery and human trafficking. Notwithstanding this link and the fact that these two notions can be employed at the same time, it does not necessarily follow that they have the same meaning. This concept becomes even easier to understand with the explanations provided in the next chapter.¹⁵¹

Moreover, other acts that resemble slavery, and that form the third component of the definition of trafficking, and that are linked with slavery or illegal ownership of individuals, are always connected to force, threat and abuse in one way or another. Several international conventions have listed decisive factors in order to identify practices that resemble slavery. These factors include prohibition of freedom of migration; forced labour or confiscating of personal items; ideas of property *de jure* or *de facto*; adequate living environment; and insufficient wages.

¹⁴⁷ *ibid*, paras 123-142, p 33.

¹⁴⁸ *ibid* para 131, p 34. Arts 225-13 and 225-14 of the French Criminal Code did not satisfy the requirements of art 4 of the ECHR, dealing with exploitation through labour and subjection to working and living conditions contrary to human dignity: *ibid* para 135, p 35.

¹⁴⁹ Suzanne Egan, 'Protecting the Victims of Trafficking: Problems and Prospects' (2008) 1 *Eur Hum Rts L Rev* 106-119. The court has failed to recognize that the human rights of the victim have been violated which could have enable her seek for the enforcement of such rights; thus, assisting her to upheld her human rights. The court also fails to penalize the woman that trafficked the victim which could have send a strong message to others of her like mind that courts will safeguard victims of such act.

¹⁵⁰ The Slavery Convention 1926, art 1. See this chapter, section 1.2 above. Moreover, the UNODC notes that that unnecessarily proposes an alternative definition: UNODC, *Model Law Against Trafficking in Persons* (UN 2009) 19.

¹⁵¹ For detailed analysis of the slavery/enslavement definition and its relationship to trafficking, see Chapter 3, section 3.2 below.

Interestingly, the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956 (1956 Slavery Convention)¹⁵² has provided a list of the most significant forms of slavery of the modern world. These comprise:

1. Child adoption (though presumably this does not cover all forms of child adoption);
2. Domestic serfdom;
3. Debt bondage; and
4. Inappropriate traditional practices (such as the marrying of girls in return for a dowry). Girls in many jurisdictions now mean any female under the age of 18.

The 1956 Slavery Convention abolished these crimes by prohibiting slave trade in all forms. The Trafficking Protocol includes several forms of slavery in a formal draft proposal that provides for several important aspects of the Convention under the phrase, 'illicit aim or purpose'.¹⁵³

Debt bondage is the first practice that resembles slavery under the element of 'purpose'. Debt bondage refers to a condition in which the debtor promises to provide his/her assistance in response for the debt that he/she has undertaken.¹⁵⁴ The definition does not make the act of debt bondage voluntary. This is because according to international law, regardless of any factor, debt bondage can never be regarded as being voluntary or legal. Thus, this meaning of the term is included in the prohibition

¹⁵² UN, Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery 1956, 226 UNTS 3 (adopted 7 September 1956, entered into force 30 April 1957) by a Conference of Plenipotentiaries convened by Economic and Social Council Resolution 608(XI).

¹⁵³ UNGA, 'Proposals and Contributions Received from Governments' (23 December 1999) UN Doc A/AC.254/5/Add.19, art 2 bis (viii), p 12; UNGA, 'Proposals and Contributions Received from Governments' (10 April 2000) UN Doc A/AC.254/5/Add. 25, art 2 bis (viii) p 6.

¹⁵⁴ 1956 Slavery Convention, art 1(a).

on servitude in the International Covenant on Civil and Political Rights 1966¹⁵⁵ (1966 ICCPR).¹⁵⁶ The UN Committees of bonded labour issues¹⁵⁷ also encourage this inclusion.¹⁵⁸ Bonded labour is frequently referred to as a 'servile status',¹⁵⁹ as a migrant worker will often end up borrowing a sum of money because of poverty, for travelling purposes. The money borrowed is charged at a high amount of interest that has to be paid by the individual as soon as possible. This raises the issue of exploitation of labour. Consequently, the victim may be deprived of their lawful wages and may also be forced to enter illegal employment contracts. It is commonly seen that migrant workers are promised wages at the start of their work, but are then denied the payments once their work is complete.¹⁶⁰ This is why the ILO Protection of Wages Convention 1949¹⁶¹ provides that all workers must be paid regularly for their work and must be given the right to end their work period at their will.¹⁶²

Serfdom is the second practice that is relevant to this discussion one of the purposes of the crime under discussion. In serfdom, it becomes mandatory for an individual to live, work, and provide his/her services against his/her will at a place or residence that does not belong to him/her. He/she is often not paid for his/her work and is deprived of the right to change his/her status.¹⁶³ Serfdom is, in practical terms, similar to

¹⁵⁵ Manfred Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary* (2nd edn, NP Engel 2005) 148.

¹⁵⁶ UN, 993 UNTS 3, UNGA Res 2200A (XXI) (adopted 16 December 1966, entered into force 3 January 1976).

¹⁵⁷ The UN definition of bonded labour is: 'the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.'

¹⁵⁸ UNESC, 'Concluding Observations of the Committee on Economic, Social and Cultural Rights: Nepal' (16 January 2008) UN Doc E/C.12/NPL/CO/2, para 18.

¹⁵⁹ UNCHR, Fifty-Second Session, 'Contemporary Forms of Slavery: Updated Review of the Implementation of and Follow-up to the Conventions on Slavery by Mr David Weissbrodt and Anti-Slavery International' (26 May 2000) UN Doc E/CN.4/Sub.2/2000/3, para 16.

¹⁶⁰ Bridget Anderson and Ben Rogaly, 'Forced Labour and Migration to the UK' (Study Prepared by COMPAS in Collaboration with the Trades Union Congress, 2005) 39 <<https://www.tuc.org.uk/international/tuc-9317-f0.pdf>> accessed 23 May 2013.

¹⁶¹ ILO, (C095) Protection of Wages Convention 1949, 138 UNTS 225, No 95 (adopted 01 July 1949, entered into force 24 September 1952).

¹⁶² Arts 9-12.

¹⁶³ 1956 Slavery Convention, art 1(b).

domestic slavery as the victim (mostly with an agricultural background) of slavery often lives in serfdom.¹⁶⁴

Traditional custom, such as non-commercial sexual activity, is the third practice that forms one of the purposes of the crime of trafficking.¹⁶⁵ In many societies and customs, wives are in a position of high exploitation by their in-laws. Also, the exchange of dowry is another way in which married females are taken advantage of.¹⁶⁶ Under the 1956 Slavery Convention, there are three practices that females have to endure in the name of marriage: where the woman does not consent to the marriage and she is married off in return for some monetary or material benefits for the family (this is a violation of human rights);¹⁶⁷ the complete authority of the in-laws and the husband to give the women to any party in return for personal favours;¹⁶⁸ and the transfer of the woman to another man without her consent after the death of her husband.¹⁶⁹ In the third scenario, the woman is often married to the deceased husband's family member, such as his brother, without her will,¹⁷⁰ known as 'levirate'.¹⁷¹

A fourth component of 'purpose' comes into play when a child of less than 18 years is forcefully handed over to someone other than the original parent or guardian of the child in return for some kind of favour, such as forced labour¹⁷² or forceful admission into military service. Here, it is important to mention that the prohibition only applies to selling the children and not to any form of illicit adoption, which is a gap in the legal framework. The major determining factor in this case is the reason behind the adoption, as per the scope of the Trafficking Protocol. A significant analysis presented by the Travaux Préparatoires is that adoption shall be deemed as exploitative if its

¹⁶⁴ Seymour Drescher, *A Historical Guide to World Slavery* (OUP 1998) 113.

¹⁶⁵ UNODC, *Combating Trafficking in Persons: A Handbook for Parliamentarians* (UNODC 2009) 15.

¹⁶⁶ UNESCO, 'Contemporary Forms of Slavery' (26 May 2000), UN Doc E/CN.4/Sub.2/2000/3/Add.1, para 59.

¹⁶⁷ 1956 Slavery Convention, art 1(c)(i).

¹⁶⁸ Art 1(c)(ii).

¹⁶⁹ Art 1(c)(iii).

¹⁷⁰ This may cover trafficking for marriage and certain forms of "mail order bride" practices': UNODC, *Model Law Against Trafficking in Persons* (UN 2009) 18.

¹⁷¹ Timothy M Willis, *The Elders of the City: A Study of the Elders-Laws in Deuteronomy* (Society of Biblical Literature 2001) 235.

¹⁷² 1956 Slavery Convention, art 1(d). The UNODC erroneously stated that the 1956 Slavery Convention 'specifically prohibits the exploitation of children and adolescents': UNODC, *Model Law Against Trafficking in Persons* (UN 2009) 18.

motives and features are similar to the case of slavery as per the 1956 Slavery Convention.¹⁷³

Moreover, other than the features mentioned above, children are also trafficked with the help of illicit religious practices, such as the *Juju* oath. This is particularly common in Nigeria and other regions of West Africa.¹⁷⁴ This kind of trafficking can be difficult to combat as it influences the mental state of the child into believing that the traffickers have complete right over them. The kind of brainwashing is seen as being so profound that it is often difficult to convince the child that they have an identity of their own, other than the one presented by their trafficker. When the children are made to leave their homes, they are forced to enter into an oath taken by the *Juju* priest who binds them by the oath, forcing them to follow the commands of their traffickers. They are told that failure to do so will result in spiritual punishment in the form of nightmares, paranoia, or even death. The victims are so badly affected by these oaths that they refuse to testify against their traffickers even when taken into protection.¹⁷⁵

Servitude is the last exploitation that comprises the element of ‘purpose’ in the definition provided by the Trafficking Protocol. No individual may be held in servitude according to the 1966 ICCPR, article 8(2) and the Universal Declaration of Human Rights 1948 (UDHR),¹⁷⁶ article 4. While direct reference to servitude is not made in any of these international laws, indirect indication is made towards actions that resemble slavery and less. According to this criterion, servitude is also prohibited because in terms of the violation of human rights and the misuse of power,¹⁷⁷ servitude is an even broader crime than slavery itself.¹⁷⁸ Since this term does not offer a well-structured definition, and has overlapping meanings with regards to slavery and related practices,

¹⁷³ UNODC, *Model Law Against Trafficking in Persons* (UN 2009) 347, note (d). It is worth mentioning that the UNODC Handbook for Parliamentarians mistakenly identifies practices related with slavery and the slave trade (and thereby prohibited by the 1956 Slavery Convention), such as transportation and branding of slaves, as ‘practices similar to slavery’: UNODC, *Combating Trafficking in Persons: A Handbook for Parliamentarians* (UNODC 2009) 16.

¹⁷⁴ Grace Osakue, ‘Realities of Trafficking in Source Countries’ (‘Bringing Human Trafficking Out of the Shadows’ Conference, Cardiff, November 2012).

¹⁷⁵ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2013).

¹⁷⁶ UN, UNGA Res 217 A(III) (adopted 10 December 1948).

¹⁷⁷ Nowak (n 155).199.

¹⁷⁸ Nowak cited the relevant *Travaux Préparatoires* to support his argument that ‘servitude’ covers practices similar to slavery involving economic exploitation such as debt bondage, servile forms of marriage, and all forms of trafficking in women and children: *ibid* 199-201.

its usage has been debated.¹⁷⁹ There is also the issue of ‘penal servitude’, which forms part of the criminal justice system. For that reason, several attempts were made to properly define this term when the Trafficking Protocol was being drafted. Thus, the definition that was settled upon stated that servitude is an act of inexcusable reliance in which an individual is forced to carry out actions for another individual without his/her consent and is forced into believing that there is no way out of the situation except to silently submit.¹⁸⁰ Unfortunately, this definition was removed from the final draft for unknown reasons. As a result, it has been suggested that it is necessary to consider both the 1948 UDHR and the 1966 ICCPR in order to fully understand the concept of servitude.¹⁸¹ Forced labour within a state penal system does not form part of the subject matter of this thesis.

It has been observed by the researcher that servitude is the chief form of exploitation suffered by victims of human trafficking. Victims may suffer servitude in both direct and indirect ways. Direct ways include the removal of official identity documents of the victims, such as passports, so that they are unable to leave; and indirect ways include the non-payment of wages with the false promise of future investments.

Unfortunately, poor workers are unable to resist such offers and therefore face severe mistreatment at the hands of their employers, with minimum pay.¹⁸² Furthermore, it has also been seen that immigrant workers often face discrimination that violates human rights.¹⁸³ Employers often argue that it is necessary for them to confiscate the passports of their employees so that they work vigilantly till the end of their

¹⁷⁹ UNODC, *Model Law Against Trafficking in Persons* (UN 2009) 344, note 29.

¹⁸⁰ UNGA, Revised Draft Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, (19 July 2000) UN Doc A/AC.254/4/Add.3/Rev.7, art 2 bis (c), p 4.

¹⁸¹ The UN proposes that servitude: ‘shall mean the labour conditions and/or the obligation to work or to render services from which the person in question cannot escape and which he or she cannot change.’: UNODC, *Model Law Against Trafficking in Persons* (UN 2009) 20.

¹⁸² Verene Shepherd, ‘The ‘Other Middle Passage?’ in Verene Shepherd (ed), *Working Slavery, Pricing Freedom: Perspectives from the Caribbean, Africa and the African Diaspora* (Palgrave Macmillan 2002) 346. Furthermore, the US drafted a proposal and contributions for one kind of servitude, which is ‘sexual servitude’. This is defined as ‘sexual services exacted from any person under the threat or use of force’.

¹⁸³ UNCHR, 20th Session, ‘Report of the Working Group on Contemporary Forms of Slavery’ (13 June 1995) UN Doc E/CN.4/Sub.2/1995/28, recommendation 8, p 25.

contracts.¹⁸⁴ However, according to the UN Working Group Report, such confiscation is simply a means of maintaining control over employees, particularly the ones employed in domestic services.¹⁸⁵ The Gulf Cooperation Council (GCC) countries, particularly the KSA, witness this problem on a regular basis (the KSA is discussed in this thesis in Chapter 6). In view of this, a suggestion was submitted to the government to prevent employers from confiscating national identity documents of their government. This was also an attempt at ensuring that workers are under the protection of the government.¹⁸⁶ For this reason, servitude is defined as a situation that limits the basic rights of the victim due to his/her dependence on his/her abusive employers.¹⁸⁷

In terms of the discussion so far, it is vital to assess whether forced or compulsory labour, servitude, and slavery are all the same. Slavery basically means treating an individual in a manner akin to or worse than an animal. Servitude means coercing a person into service against their will. Forced or compulsory labour means forcing an individual to perform actions against his/her will and under the threat of physical, mental, or social penalty. In these three definitions, the common feature is the provision of services to the employer against the will of the employee. The difference is only seen in the nature of the work that these people are forced to do. Thus, the three terms are not mutually exclusive. This means that they may overlap; for example, an individual may be a slave and also a victim of servitude or forced labour at the same time.

The Trafficking Protocol's definition of human trafficking attempts to include all these terms in order to define the most prevalent human trafficking practices. They are mentioned under the element of 'purposes of trafficking' as examples rather than as limitations. The significance of understanding these terms and their patterns is found in the link between human trafficking and these terms.

¹⁸⁴ ILO, *Report on Gender and Migration in Arab States: The Case of Domestic Workers* (ILO 2004) 20.

¹⁸⁵ UNCHR, 21st Session, 'Report of the Working Group on Contemporary Forms of Slavery' (19 July 1996), UN Doc E/CN.4/Sub.2/1996/24, recommendation 9, p 28.

¹⁸⁶ UNCHR, 'Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights' (28 December 1999) UN Doc E/CN.4/2000/12, para 68.

¹⁸⁷ UNGA, 'Proposals and Contributions Received from Governments' (10 April 2000) UN Doc A/AC.254/5/Add.25, Article 2 bis (c), p 11.

In order to understand the practical application of the human trafficking legislation, a detailed discussion is presented in Chapter 3. Chapter 4 discusses the protection of trafficked victims, which is also an important characteristic of the Trafficking Protocol.

2.5.3 Removal of Organs

Removal of organs is the last ‘purpose’¹⁸⁸ for which individuals are trafficked.¹⁸⁹ Less affluent people and those who are physically, socially and mentally weak are those most commonly exploited in this way, for the sake of monetary gain.¹⁹⁰ The removal of organs from the body of an individual constitutes bodily exploitation. Since this is now a market business, the supply chain management is carefully controlled and donors are selected from the vulnerable population. These vulnerable people tend to sell their organs in return for financial help, which is generally never given in spite of promises.¹⁹¹ Like other forms of exploitation, this one also prevails as a result of poverty and misuse of authority or power over an individual or group. The Trafficking Protocol demands the criminalization of organ removal due to its exploitative nature,¹⁹² and also because of the complexity of this crime that demands the recruitment of donors who willingly participate and engage in the crime of human trafficking for the purpose of organ removal. According to the UN TOC Convention, it is important for both natural persons and medical personnel to be involved in combating this crime, although, in terms of medical personnel, it is important to impose liability for both legal and natural individuals.

International laws included a provision on organ removal after much debate. For a long time it was debated that the Trafficking Protocol was intended to deal with human

¹⁸⁸ In the same vein, the law of Saudi Arabia also adds the aspect of medical tests along with other activities that are being used in human trafficking (KSA 2009 Trafficking Law, 2009) <www.protectionproject.org/wp-content/uploads/2010/09/Saudi-Arabia_TIP-Law_2009_Combined.pdf> accessed 24 October 2012.

¹⁸⁹ Maria N Morelli, ‘Organ Trafficking: Legislative Proposals to Protect Minors’ (1994) 10(2) Am UJ Intl L & Poly 917-954; David Price, *Legal and Ethical Aspects of Organ Transplantation* (CUP 2000).

¹⁹⁰ Kauko Aromaa, ‘Trafficking in Human Beings: Uniform Definitions for Better Measuring and for Effective Counter-Measures’ in Ernesto U Savona and Sonia Stefanizzi (eds), *Measuring Human Trafficking: Complexities and Pitfalls* (Springer 2007) 16.

¹⁹¹ Erica D Roberts, ‘When the Storehouse is Empty, Unconscionable Contracts Abound: Why Transplant Tourism Should Not Be Ignored’ (2009) 52(3) Howard LJ 747, 783.

¹⁹² UN Trafficking Protocol, art 5.

trafficking and not organ trafficking.¹⁹³ The Ad Hoc Working Group complained that including a provision on organ removal as part of the purposes of human trafficking by the Trafficking Protocol would only serve to increase the workload for the officials, as now they would be required to examine the regulations with regard to organ removal.¹⁹⁴

However, since the final definition agreed to include the provision on organ removal, the crime has received high status and is now given more attention.¹⁹⁵ On further exploration of this issue, it has been seen that the content on organ removal in terms of human trafficking is different from the content on the trafficking of cells and tissues. It has been seen that trafficking of cells and tissues is even more widespread than human trafficking for organ removal because the former category is classified as being a specialized form of trafficking. The difference between human trafficking and trafficking for the purpose of organ/tissue/cell removal lies in the basic aim of the two crimes. The former deals with human beings (trafficked victims) as the main objects of trafficking, whereas the latter deals with individual cells, tissues, and organs as the objects of the crime.¹⁹⁶ This is why the trafficking of cells and tissues is not included in the UN Trafficking Protocol,¹⁹⁷ as protection of and assistance to the victims is one of the requirements of this Protocol.

¹⁹³ UNODC, *Model Law Against Trafficking in Persons* (UN 2009) 344, note 28.

¹⁹⁴ This is shown by the European Union's deletion of organ removal from the definition of trafficking in its 2002 European Framework Decision on Trafficking: EU Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings [2002] OJ L 203/1. However, the 2009 Council Decision extended the relevant definition to include '... forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs': EU COE, Council Decision of 6 April 2009 Establishing the European Police Office (Europol) [2009] OJ L 121/37, Annex (c). The amended definition echoes the definition in the UN Trafficking Protocol and the EU COE Council Framework Decision, thus reducing the inconsistencies between the various definitions at EU level.

¹⁹⁵ See further, Nancy Scheper-Hughes, 'Illegal Organ Trade: Global Justice and the Traffic in Human Organs' in Rainer Guessner and Enrico Benedetti, *Living Donor Organ Transplantation* (McGraw Hill Professional 2008) 106-121.

¹⁹⁶ COE and UN, *Study on Trafficking in Organs, Tissues and Cells and Trafficking in Human Beings for the Purpose of the Removal of Organs* (COE 2009) 96.

¹⁹⁷ UN, 'Trafficking in Persons for the Purpose of Removal of Organs', UN Doc CTOC/COP/WG.4/2011/2 (Conference of the Parties to the UN TOC Convention, Vienna, October 2011) para 9
<<http://www.unodc.org/unodc/en/treaties/CTOC/working-group-on-trafficking-oct-2011.html>>
accessed 16 November 2013.

Moreover, it is observed that the UN Trafficking Protocol does not consider the crime of human trafficking for organ removal as being distinct from organ donation.¹⁹⁸ Human trafficking for organ removal versus trafficking of purchased organs is a matter that is relatively unknown.¹⁹⁹ The majority of cases observed involve removal of organs of trafficked individuals. An important point to mention here is that the removal of a child's organ for medical experiments and/or diagnostic purposes, with the consent of the parent or guardian, will not render the action criminal or exploitative.²⁰⁰ The COE Recommendation also states that trafficking of organs deals with the movement of an individual for the removal of their organ for the purpose of transplantation, against his/her consent and will, and contrary to the relevant international and national legal regulations.²⁰¹

Conclusively, it can be said that even though the definition attempts to deal with several forms of trafficking, it still has some limitations. Also, the aspect of labour exploitation demands further explanation. This will be examined in Chapters 3 and 7 of this thesis.

2.6 HUMAN TRAFFICKING AS A TRANSNATIONAL CRIMINAL ACTIVITY

So far, this study has analysed the three fundamental characteristics (action, means and purpose) of human trafficking. In this section, the focus shall be on human trafficking as a transnational crime. This was expressed by Hathaway²⁰² as the fourth element of the definition. He argues that it is not necessary for the UN Trafficking Protocol to include all kinds of trafficking; rather, it should focus only on the ones that possess a transnational aspect. Interestingly, in the UN laws, there are no sanctions placed over unauthorized dealings carried out for exploitive reasons and using unfair

¹⁹⁸ However, according to one study, the majority of commercial living-donors who sold a kidney to repay a debt reported no economic improvement in their lives, as they were either still in debt or were unable to achieve their objective in selling the kidney. According to the same study, 94% regretted their donation: *ibid* para 20.

¹⁹⁹ *ibid* para 8.

²⁰⁰ *ibid* para 15. UN, Commission on Crime Prevention and Criminal Justice, 'Preventing, Combating and Punishing Trafficking in Human Organs' (21 February 2006) UN Doc E/CN.15/2006/10, paras 27-28.

²⁰¹ COE, Recommendation (2004) 7 of the Committee of Ministers to Member States on Organ Trafficking (19 May 2004), art 2(4).

²⁰² James C Hathaway, 'The Human Rights Quagmire of Human Trafficking' [2008] 49(1) *Va J Intl L* 1, 11.

means, unless these dealings relate to and have an effect on more than one state. The issue of addressing non-transnational human trafficking issues is left to individual states, and their domestic legal frameworks. However, it might be significant to consider the difference between an international crime and a transnational crime.

In order to do so, it is important to understand both terms individually. International crime is an indication towards crimes that:

- a. violate international laws and human rights,
- b. involve violence,
- c. lead to wars and genocides,
- d. infringe international criminal law.

Bhattacharyya explained that international crimes are those that have international elements, implications, effects, and consequences. These crimes are such that their offensive nature questions the integrity of several global laws. These crimes are a threat to security and peace of the world, and they are generally carried out against the sovereignty of a state by another state, affecting the moral and social conscience of the entire world, and placing serious threats on world peace and the safeguarding of the entire population.²⁰³

Conversely, transnational crimes are offensive conduct affecting two or more states, affecting the sovereignty and security of the citizens of these states only, and involving actions by private citizen that sometimes go beyond the national borders. As a result, transnational crimes have a relatively smaller impact on world peace and affect the sovereignty of the world on a relatively smaller scale. The regulations formulated for these crimes are usually the result of conflicting approaches to these crimes.²⁰⁴ Transnational crime has come to prominence more recently than international crimes, and is closely connected with increased globalization. Transnational law enforcement

²⁰³ Rupa Bhattacharyya, 'Establishing a Rule-of-Law International Criminal Justice System' (1996) 31(1) *Tex Intl LJ* 57, 66.

²⁰⁴ *Rijken* (n 39) 45.

networks are an even more recent phenomenon, as states attempt to grapple with transnational organized crime, with the assistance of other states. The EU, in particular, is seen as one of the main players in developing transnational law enforcement legal frameworks and networks. They utilize a model that may need to be adopted by more countries, in other parts of the world, in order to properly tackle the increasing rise of transnational organized crime, in particular, in the context of this thesis, trafficking in human beings, and its closely connected crime of human smuggling.

Thus, it would not be wrong to say that transnational crimes are definitely a threat to the entire world, as they are not as great a threat as international crimes.²⁰⁵ The aftermath of international crime, such as violence, to include trafficking in human beings as a war crime, and torture, are a result of the manner in which the crime is carried out, the extent of the crime, its nature, number of individuals involved in perpetrating the crime and the number of individuals affected by the crime. While some transnational crimes may be as severe as international ones, their aftermath is more dependent upon the manner in which the crime was committed and its extent, rather than the nature of the crime. It is possible that a large population is affected by transnational crimes since several countries are involved.²⁰⁶ One of the chief characteristic features of transnational crimes is that organized criminal groups are involved at a particular stage. These groups have links with more than one country, and they exploit the borders between different legal jurisdictions and law enforcement frameworks, and this is what defines the characteristics of transnational crimes. Unfortunately, the international involvement of these groups increases the severity of the crime and makes it more difficult to locate and punish the criminals. This is why it is essential to formulate solutions which extend beyond national levels, for the protection of the victims. For example trafficking in human beings into the KSA may require the KSA legal and law enforcement framework to develop close relationships with those legal jurisdictions which form part of the human supply chain that the KSA is

²⁰⁵ Cherif M Bassiouni, *International Criminal Law: Crimes*, vol I (2nd edn, Transnational Publisher 1999) 33.

²⁰⁶ Cherif M Bassiouni, *International Criminal Law: Cases and Materials* (Caroline Academic Press 1996) 18-19.

aiming to tackle. Regional agreements of like-minded jurisdictions, of similar levels of wealth may not address the issue of organized crime's reach into the KSA. To date, there have been responses to transitional criminal activities on the basis of national expertise; however, it is advised that a focused development at a transnational level, between relevant states is needed to effectively combat this issue.

2.7 CONCLUSION

This chapter provides a thorough explanation of the three fundamental characteristics (action, means, and purpose), and transitional crime as being the fourth characteristic, that constitute the definition of human trafficking according to the Trafficking Protocol. It provides a detailed analysis of the features of this crime and the manner in which it is carried out.

Moreover, it explains the ways in which the act of human trafficking is made exploitative and how sexual exploitation, labour exploitation, and removal of organs, constitute the purposes of exploitation.

The chapter also considers the intricate distinctions seen with respect to these exploitations. It highlights the ways in which forced labour shows variations in its form and how it is linked to other related exploitations. It explains that trafficking for the purpose of organ removal is distinguishable from organ trafficking, because of different aims and motives involved in the two crimes.

Lastly, it explains trafficking from a transnational point of view. It provides a distinction between transitional and international crimes, and the way in which the aftermath of the two prevails. It also explains the degree of severity of the two forms of crime and the way they are dealt with by the international laws.

The chapter indicates the link between the content of human trafficking and other related crimes, and the way human trafficking shows variations, which is a phenomenon discussed in more detail in the next chapter. The definition of trafficking has been discussed in detail so as to present a comparative analysis between the laws and regulations dealing with it in the UK and the KSA, in the following chapters.

CHAPTER 3: DISTINGUISHING HUMAN TRAFFICKING FROM OTHER CONTEMPORARY ACTIVITIES

3.1 INTRODUCTION

Building on the discussion in Chapter 2, this chapter discusses the modern aspects of human trafficking in the context of other modern crimes, using the chief concepts set out in the UN Trafficking Protocol. In the first section, the discussions presented are based on the link between human trafficking and related concepts. The discussion assesses the connection between trafficking and chattel slavery, and then contrasts it with the definition of human smuggling, as set out in the UN Smuggling Protocol, with which it is often confused. It is important to understand these connections, because human trafficking is a socially unacceptable illicit offence that has become increasingly dangerous, owing to its link with other activities, such as migration and organized crime. Therefore, there is a need to develop extensive regulations for both victims and traffickers.

Then, this chapter explains the connection between human trafficking and labour migration, in light of appropriate information.¹ It addresses recent issues involving social networking, human rights, organized crime, and explains how these phenomena have affected the definition of trafficking as set out in the UN Trafficking Protocol. The researcher believes that this definition is vast and detailed in its form, incorporating nearly all the relevant issues. Moreover, it is emphasized that the crime of trafficking is acknowledged as a threat to basic human rights.

3.2 HUMAN TRAFFICKING IN THE CONTEXT OF SLAVERY

Human trafficking has been described in several contexts, and affects both males and females; both sexes can become victims of nearly all the forms of trafficking. Various remarks can be highlighted concerning this definition. First is the non-inclusion of

¹ See further discussion in Chapter 6.

human trafficking in the category of slavery. However, it has been mentioned that one of the eventual outcomes of human trafficking is exploitation of victims. Second, various forms of exploitation have been rendered as different from slavery. In fact, use of slavery in any activity related to trafficking appears to constitute a criminal activity. Third, including slavery in the definition of trafficking is strong evidence of a link between trafficking and slavery.

The link between slavery and trafficking is still considered complex under international law.² Trafficking as a form of slavery, and vice versa, is a common subject of discussion among academics and legislators. Practically speaking, in the contemporary world, slavery is a term used to include debt bondage, forced prostitution, forced labour, and other activities that may also arise as part of the trafficking crime.³ According to Gallagher, the concept behind this link is easy to grasp because slavery has an emotional and political implication. By connecting trafficking and slavery together, we tend to maximize the emotional gamble, which in turn leads to a significant level of legal stress.⁴ For example, routinely, international law has placed a ban on slavery,⁵ regarding its abolition a legal obligation *erga omnes*, and an element of *jus cogens*.⁶

In relation to contemporary forms of slavery, the concept of *de jure* slavery arises, ie that the notion of having rights over, or 'owning', other individuals does not exist. According to the researcher, compulsion, and intimidation are other methods of trafficking that deliberately take advantage of an individual's vulnerability. Forcing someone to dispense sexual services or labour, are attributes of *de facto* slavery. Regardless, the issue of real slavery is a legal matter distinct from the safeguarding of trafficked individuals. With respect to *de jure* slavery, we need to also understand the factors that are used to recognize whether such activities can be considered to be limited to slavery or not. Human trafficking is only regarded as slavery if the criminal claims to have the right of ownership over the victim; thus, trafficking in human beings

² Reference to slavery in the definition of trafficking in the UN Trafficking Protocol, art 2, and reference to trafficking in the definition of enslavement in the ICC Statute, art 7(2)(c).

³ UNCHR, Abolishing Slavery and its Contemporary Forms by David Weissbrodt and Anti-Slavery International (2002) HR/PUB/02/4, paras 30-149.

⁴ Anne T Gallagher, *The International Law of Human Trafficking* (CUP 2010) 178.

⁵ *Prosecutor v Kunarac, Kovac and Vukovic* [2001] IT-96-23-T & IT-96-23/1-T, para 520.

⁶ Holly Cullen, *The Role of International Law in the Elimination of Child Labour* (Martinus Nijhoff 2007) 35.

is not regarded as synonymous with slavery, nor has it been given the position of *jus cogens*. Moreover, even though human trafficking is regarded as an illegal activity, its prohibition has not been recognized as a legal obligation *erga omnes*; which refers to the duty of international laws to provide a safeguard to protect enslaved victims.⁷ In order to insure that the victims of trafficking are protected and traffickers are punished, this researcher believes that components of trafficking law such as compulsion, would suggest enslavement.

According to the researcher's knowledge, when establishing the definition of human trafficking, the primary component of the definition of slavery in the Slavery Convention was overlooked. In this context, we will analyse whether the condemnation of slavery should cover human trafficking or not. This is because, in cases of human trafficking, slavery is simply one of several probable outcomes, and slavery is not proven unless 'powers attaching to the right of ownership are exercised'.⁸

The word 'enslavement' was used in the Yugoslavia war crimes tribunal case of the *Prosecutor v Kunarac, Kovac and Vukovic*. In this case, enslavement was regarded as a criminal offence for the first time by the ICTY.⁹ According to the ICTY, the *actus reus* of enslavement referred to the employment of authority, implying right to ownership of an individual.¹⁰ Several factors need to be looked into in reference to this, to determine if the actual crime of enslavement occurred. These factors include having power over an individual's location, his right to travel, his mind, also intimidating him, holding him against his will, treating the individual badly, forcing him into inappropriate sexual activities, and forced labour.¹¹

There is a need to establish a discriminating line between slavery and enslavement. Enslavement means making an individual a slave. In other words, it means the state of being a slave and being placed in difficult conditions, from which it is difficult to free

⁷ Kirsten Schmalenbach, 'Treaties Conflicting with a Peremptory Norm of General International Law' (*'jus cogens'*) in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2012) 939.

⁸ Jean Allain, 'The Definition of Slavery in International Law' (2009) 52(2) *Howard LJ* 239, 262-266.

⁹ *Prosecutor v Kunarac, Kovac and Vukovic* [2001] IT-96-23-T & IT-96-23/1-T, para 539.

¹⁰ *ibid* para 540.

¹¹ *ibid* paras 542-543.

oneself. On the other hand, slavery also refers to a system whereby there is ownership of people by others. As we can see, this difference is slight. An individual under bondage as chattel, entirely under the control of his master is said to be in a state of slavery. An enslaved individual is one who has his financial rights removed by his master, thus limiting his movement and role as an individual.

The European Convention on Human Rights (ECHR)¹² put forward the matter of whether trafficking is equal to slavery in the case of *Rantsev v Cyprus and Russia*.¹³ Here, the ECtHR was responsible for determining if the response of Cyprus and Russia to a trafficking case, which led to death, violated the duties of these States under article 4 of the ECHR.¹⁴ For this purpose, the Court referenced the decisions taken in the case of *Siliadin* and the ICTY¹⁵ in the *Kunarac* case, which remarked that trafficking in human beings is related to the exertion of authority over the right to ownership, because its aim is usually to promote exploitation of individuals on the basis of 'owning' them. It serves to treat humans as objects, items that can be bought or sold, and made to work against their will with hardly any monetary returns. These victims are restricted from travelling, and often forced and threatened to work in undesirable conditions. This kind of treatment shall be considered synonymous with the historical reality of the slave trade.¹⁶ Nevertheless, the Court abstained from mentioning clearly if it considered trafficking as slavery or not. It said that it deems the idea of recognizing the crime as being an act of 'slavery' or 'forced or compulsory labour' or 'servitude' quite unnecessary and irrelevant when analysing the ECHR in the modern world. Instead, the Court claimed that trafficking in human beings comes under the category of article 4 of the ECHR in light of the UN and COE definition of trafficking.¹⁷

¹² COE, CETS No 005, 4 November 1950 (entered into force 3 September 1953).

¹³ *Rantsev v. Cyprus and Russia* App no. 25965/04 (ECtHR, 7 January 2010), para 282.

¹⁴ Henry Wilson Harris, *Human Merchandise: A Study of the International Traffic in Women* (E Benn Limited 1928) 83.

¹⁵ Kate Nahapetian, 'Selective Justice: Prosecuting Rape in the International Criminal Tribunals for the Former Yugoslavia and Rwanda Recent Developments' (1999) 14(1) *Berkeley Women's LJ* 126, 126-135.

¹⁶ *Rantsev v Cyprus and Russia* (n 13) para 281.

¹⁷ *ibid* para 282.

Despite this conclusion seeming significant and understandable, the question arises as to why trafficking comes under article 4.¹⁸ Some proofs verify the resemblance between trafficking and slavery. For instance, according to the COE Trafficking Convention, trafficking does at times result in slavery.¹⁹ The Charter of Fundamental Rights of the European Union 2000 (2000 EU CFR)²⁰, in particular discusses banning trafficking in the slavery article.²¹ The ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1999 (1999 ILO WFCL Convention)²² demands quick and efficient action to prohibit child labour,²³ which include various kinds of slavery and activities related to slavery,²⁴ such as the trafficking of children, forced labour, and begging.

However, in view of the above, we cannot claim that trafficking is entirely synonymous with slavery. It does however show the literature on slavery is not as extensive and comprehensively maintained as one might assume.²⁵ Without doubt, we have proof that certain components of slavery might be present in modern forms of exploitation like trafficking and bondage; however, an act of trafficking, forced labour or debt bondage can only be regarded as an act of slavery if it fulfils the definition proposed in the Slavery Convention.²⁶ There are many occasions when slavery might be regarded as an act of trafficking, although the idea of slavery has now been expanded to include activities beyond chattel slavery (which might be considered as trafficking); however, we still cannot claim that trafficking comprises customary *jus cogens*, which strictly condemns slavery. Instances of trafficking offer obvious proof of use of power with respect to the right of ownership,²⁷ and may provide an adequate level of support regarding the presence of slavery, leading to the fulfilment of a slavery benchmark.

¹⁸ This case is considered to be one of the significant judgments clarifying certain key obligations - in particular, effective criminal justice response and prevention.

¹⁹ The Preamble.

²⁰ EU [2000] OJ C 364/1 (adopted 7 December 2000). The Charter became legally binding when the Treaty of Lisbon entered into force on 1 December 2009, as the Treaty confers on the Charter the same legal value as the Treaties.

²¹ *ibid* art 5(3).

²² ILO (C182), 38 UNTS 1207, No 182 (adopted 17 June 1999, entered into force 19 November 2000).

²³ Art 1.

²⁴ Art 3(a).

²⁵ Gallagher (n 4) 190.

²⁶ 'The exercise of any or all of the power attached to the right of ownership' - art 1(1).

²⁷ *ibid*.

3.3 HUMAN TRAFFICKING AND SMUGGLING OF MIGRANTS

Research demonstrates that international immigrants comprise about 3% (200 million people) of the world's population.²⁸ The number is likely to show a continued upward trend. These immigrant figures include legal, illegal, irregular, and undocumented cases. We cannot determine the exact number of people forced to migrate every year, and even the strictest immigration controls have been unable to stop the forced flow of illegal immigrants. An increase from about 11,700 trafficked people in 2003 to 14,900 trafficked people in 2006 was recorded in a study of 71 countries.²⁹ These would comprise a very small percentage of global mobility figures. In the next section, we will discuss the characteristics of irregular migration and the misconceptions associated in THB.

3.3.1 Human Trafficking and Irregular Migration

Irregular migration is defined as a failed kind of migration, resulting from inappropriate migration controls and a lack of necessary regulations. It results from increased labour demands and regulations that influence migrants.³⁰ For instance, national governments have been in control of migration policy in Europe since 1980.³¹ There is a strong demand for irregular foreign workers to take inappropriate and challenging jobs,³² and yet foreign migration is strictly controlled. For this reason, under-skilled foreign workers rarely have the option to migrate using legal channels. This leads some people to seek out illegal migration channels, with the result that they become victims of human trafficking and smuggling. Other causes of irregular migrations include national and global armed conflict, civilian catastrophes, and an absence of political,

²⁸ International Organization for Migration (IOM), *World Migration Report 2008: Managing Labour Mobility in the Evolving Global Economy* (2008) 2.

²⁹ UNODC, *Global Report on Trafficking in Persons* (2009) 48.

³⁰ Dora Kostakopoulou, 'Irregular Migration and Migration Theory: Making State Authorization Less Relevant' in Barbara Bogusz and others (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff 2004) 42.

³¹ Peter Stalker, 'Migration Trends and Migration Policy in Europe' (2003) 40(5) *International Migration* 151, 153.

³² Piyasiri Wickramasekara, 'Asian Labour Migration Issues: Challenges in an Era of Globalization' [2002] *International Migration Papers* 57, 3
<<http://oit.org/public/english/protection/migrant/download/imp/imp57e.pdf>> accessed 13 November 2013.

civil, social, cultural and economic rights. These migrants have been left with no option but to flee from their homelands to escape adverse conditions, often seeking asylum in another country.³³ Thus, it is important to establish a disparity between regular and irregular (undocumented or illegal) kinds of migrations as this distinction is both strict and limited.³⁴ In conclusion, it can be said that irregular immigration is an outcome of strict immigration policies, and has now become a major international issue.

Regretfully, various migration studies have employed the terms 'illegal', 'irregular' and 'undocumented' concurrently, without proper explanation or distinction. Despite these terms having their fair share of similarities, according to the researcher, each word has a unique meaning. Thus, we justify the use of the term 'irregular immigration' for the reasons given below.

'Undocumented migration' is a reference to a breach of the receiving state's law by the migrant. The researcher believes that this term is applicable to cases in which the immigrant's official documents have been changed during the course of the journey (before, during, or after border crossing). Thus, we can categorize immigrants as 'undocumented' in cases where traffickers/smugglers confiscate documents. Conversely, an illegal immigrant is one who crosses a border illegally and violates the rules and regulations of the receiving state. Guild opines that an illegal migrant is one who enters a territory illegally, or stays in an area for a longer period than is permitted,³⁵ or works in an area where he is not allowed to work, or participates in an activity not permitted due to his immigration status.³⁶ When categorizing trafficked individuals as undocumented, they automatically become criminals, rather than, in many cases, victims of trafficking in need of protection.³⁷ The complications arising from the use of these two terms has encouraged the researcher to make use of the term 'irregular migration', which refers to state of arrival, abode, and job, and in which

³³ John Morrison, 'The Trafficking and Smuggling of Refugees: The End Game in European Asylum Policy?' [2001] UNHCR Evaluation and Policy Research Unit Working Paper 39, 24 <<http://www.unhcr.org/3af66c9b4.pdf>> accessed 16 November 2013.

³⁴ R Skeldon R, *Migration and Development: A Global Perspective* (Longman 1997) 59.

³⁵ As with some people going to Saudi Arabia for the purpose of *Hajj* or *Umra*.

³⁶ Elspeth Guild, 'Who is an Irregular Migration?' in Barbara Bogusz and others (eds), *Irregular Migration and Human Rights: Theoretical, European and International Perspectives* (Martinus Nijhoff 2004) 3.

³⁷ See further section 3.3.2.

the immigrant's status fails to match that prescribed by the destination state.³⁸ To clarify further, both regular and irregular immigrations are associated with the initial reasons for migration. Hence, if migration is associated with trafficking in human beings, then it is said to be irregular, even where migrants entered the destination country legally. This is because, sometimes, traffickers are able to produce valid documents for the migrants' travel, enabling them to enter the destination state legally. As a result, migration should not be termed as an illegal act on the basis of documentary evidence. According to research conducted by the IOM in 1995 on the trafficking of women from Eastern and Central Europe, women had in some cases gained entry to Belgium, Switzerland, and the Netherlands as entertainers.³⁹ At present, many countries use the term 'illegal migration', despite the three terms applying equally. For some reason, it is assumed that use of the phrase 'illegal migration' is more likely to convince the inhabitants of countries that an illegal activity has taken place requiring active prevention. Therefore, the term allows more intense reaction against it to be tolerated.

It would be accurate to say that the entire issue comprises several factors, which shall not be regarded as either entirely fair or unfair. It might be the case that a victim who is fully or partially aware of the fact that he is aiming to migrate in order to be able to work illegally might use the term 'irregular' to describe himself, in order to enjoy the status of victim rather than that of 'illegal' immigrant. As a result, there is a debate when persons state their innocence, and a likelihood of negative outcomes. Thus, it can be said that the safeguarding of actual victims, together with the State's integrity is likely to be threatened. Contrarily, some criminals might exploit the system and claim they are victims rather than criminals. However, according to the researcher, concerns over the exploitation of victimhood are usually overstated. It has been stated before that migrants are regarded as irregular, the reason for their immigration must be determined. Once it is determined to be exploitative, then rather than legal or illegal migration, terminology shifts to 'irregular'. It is not possible to pass a verdict immediately at the time of an individual's arrest in a massage centre, hotel, or brothel.

³⁸ Kostakopoulou (n 30) 42.

³⁹ IOM, *Trafficking and Prostitution: The Growing Exploitation of Migrant Women from Central and Eastern Europe* (IOM 1995).

It is only possible to assess such claims once the arrested person claims to be a victim in front of law enforcement agencies at the time of trial. The final verdict is only passed after law enforcement agencies have run checks on the migrant and reached a consensus regarding his/her standing. If an individual is unable to prove his innocence, officers will seek to find proof against his/her status of victimhood, and the individual might then be regarded as criminal.

There are cases where victimhood can be harder to determine; for example, those where individuals pay money to flee their homeland illegally to attain a better lifestyle in the attractive city of London, but find themselves condemned to prostitution by traffickers. In such cases, it is important to establish victimhood. The status of such an individual can typically be determined by the extent of any exploitation. If the individual is arrested for breaching the law before exploitation has taken place, then he/she is considered a criminal. However, if they have already been exploited, then they are considered a victim. Although victims may be aware of the fact that they should have passed through legal channels in order to immigrate, and that they are working illegally, they might argue that they did not consent to abusive treatment or exploitation and hence they are innocent.⁴⁰ Certainly, there is a fine line between guilt and innocence, which the law does not adequately describe. The court must decide in terms of 'guilty' or 'innocent'; however, other agencies are involved to insure a fair judgment.

Several types of irregular migration, including human smuggling and human trafficking, have now become important global issues, and as such are being extensively debated in international discourse. Trafficking in human beings, human smuggling, and irregular migration are interlinked. However, it is possible to distinguish human smuggling from trafficking, as apparent in national and international legislature against these activities, and in relation to the kind of protection programmes applied to these victims, and the adequacy of such programmes.

⁴⁰ Jo Goodey, 'Migration, Crime and Victimhood: Responses to Sex Trafficking in the EU' (2003) 5(4) *Punishment & Society* 415, 420; Vanessa E Munro, 'Stopping Traffic? A Comparative Study of Responses to the Trafficking in Women for Prostitution' (2006) 46(2) *Brit J Criminol* 318, 328.

3.3.2 Human Trafficking and Smuggling of Migrants

Human trafficking and smuggling differ in a practical sense in spite of their resemblance. We shall consider trafficking in reference to immigration before analysing the differences. IOM defines trafficking as any illicit transporting of migrant for economic or other personal benefits.⁴¹ According to the researcher, this definition *de facto* delivers mixed views about human trafficking and smuggling. Furthermore, a profound demarcation has been established by the UN Secretary-General between the two activities in respect to crossing the border.⁴² According to the UN Smuggling Protocol, human smuggling is the act of assisting the illegal entry of an individual into a country of which he is not a permanent or legal resident, after the paying of a certain amount to achieve personal benefits.⁴³ It is clear that, while both smuggling and trafficking are considered by UN protocols to be acts of crossing borders, these two activities are not considered legally equal.

The function of the smuggler is the first dissimilarity to consider. Smuggling is said to take place when smugglers are employed to help people to cross borders. This activity is undertaken for personal gain, such that the role of the smuggler finishes once the border has been crossed and the destination reached.⁴⁴ Conversely, trafficking in human beings deals with future material and monetary exploitation after the border has been successfully crossed. Thus, emphasis is on the exploitation of trafficked victims, rather than the act of trafficking.⁴⁵

The second issue to consider is where the activity takes place. Trafficking takes place both internally in a particular country and internationally,⁴⁶ whereas smuggling only involves international movement. Thus, both activities are liable to result in different national and international regulations.

⁴¹ IOM, *Trafficking in Women to Italy for Sexual Exploitation, Migration Information Programme* (IOM 1996).

⁴² UNGA, *Report on Traffic in Women and Girls* (24 August 1995) UN Doc A/50/369, UNGA Res 49/166, para 17.

⁴³ UN Smuggling Protocol, art 3(a).

⁴⁴ Ann T Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23(4) Hum Rts Qua 975, 1004.

⁴⁵ Ann T Gallagher, 'Trafficking, Smuggling and Human Rights: Tricks and Treaties' (2002) 12 Forced Migration Review 25, 25.

⁴⁶ UNGA, *Report on Traffic in Women and Girls* (n 42) para 17.

Readiness is the third factor that needs to be understood. Typically, smuggled individuals have willingly consented to being smuggled;⁴⁷ hence, they are not victims.⁴⁸ On the other hands, trafficking involves use of force, as mentioned in the definition of trafficking. It should be added here that trafficked victims might be aware they are embarking upon an illicit journey, but they are not usually aware of what in reality will be the eventual outcome of this journey.

Finally, and most importantly, trafficking can be either regular or irregular, whereas smuggling is customarily irregular only. It can be conclusively emphasized that trafficked individuals should be seen as victims; however, smuggled people are always seen as criminals.

It is important to understand these differences, because they determine whether a person is a victim of trafficking or a criminal involved in smuggling. This distinction determines if a person should be punished or requires protection. Smuggled people are often subjected to severe punishments, such as arrest, deportation or detention. Whereas, the treatment extended to trafficked victims is different.⁴⁹ Nevertheless, smuggled persons still deserve to have their human rights protected.⁵⁰

In order to protect the rights of smuggled persons, the researcher suggests a system of accommodation. The reason behind this suggestion is that, *de facto*, both smuggling and trafficking are somewhat related to one another. For example, smuggled persons might be considered victims of trafficking if they are exploited under the UN Trafficking Protocol. In such a scenario, it might be said that both traffickers and smugglers can be taken as violators of human rights as they exploit their victims. Moreover, if we relate legal migration to trafficking, whereby traffickers produce valid documents to enable

⁴⁷ Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking Who Give Evidence against Their Traffickers' (2002) 14(2) Intl J Refugee Law 263, footnote 10, p 266; Bo Cooper, 'New Approach to Protection and Law Enforcement under the Victims of Trafficking and Violence Protection Act' (2002) 51(3) Emory LJ 1041, 1047.

⁴⁸ Patrick Twomey, 'Europe's Other Market: Trafficking in People' (2000) 2(1) Eur J Migration & L 1, 7.

⁴⁹ Gallagher (n 44) 1000.

⁵⁰ Tom Obokata, 'Smuggling of Human Beings from a Human Rights Perspective: Obligations of Non-State and State Actors under International Human Rights Law' (2005) 17(2) Intl J Refugee Law 394, 402.

movement, then it can be claimed that such migration is also considered illegal, because of the illegal motives involved.⁵¹

The response of countries to irregular immigration is generally inclined in favour of a countries' safety, rather than the human rights of trafficked victims. Most people have gained entry into the EU for the purpose of illegal abode and employment.⁵² According to the authority, this affects State sovereignty. Therefore, it is important to formulate means to insure protection for both trafficked and smuggled victims to improve outcomes for individuals and the state. Despite the different responses of states, in the areas of both trafficking and smuggling, responses are largely focused on lessening crimes in the long run.

Additionally, it is necessary to re-evaluate those immigration measures related to irregular movement, as human trafficking has frequently been viewed as an irregular form of migration. Furthermore, it is important to examine trafficking in further detail to identify other activities associated with it. To achieve this, we will examine the relationship between trafficking and crime, labour immigration and human rights in this chapter. By examining issues raised by modern state authorities, the chapter will explain how well trafficking is legislated for. This is important as such issues affect legislation on trafficking in human beings in the KSA and the UK, which is the primary focus of this thesis.

3.4 HUMAN TRAFFICKING IN THE CONTEXT OF LABOUR MIGRATION

Vagueness and/or ambiguity in the legal frameworks renders migrants susceptible to exploitation and also impacts controls against migration. The rights of migrants have been severely affected because of the lack of depth of immigration law and their lack of status in national and international law. Nevertheless, human trafficking can also be considered in reference to the level of consent, ie intentional or unintentional.⁵³ Intentional or voluntary trafficking usually involves the consent of the trafficked

⁵¹ Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff 2006) 22.

⁵² Marjan Wijers and others, *Trafficking in Women, Forced Labour, and Slavery-like Practices in Marriage, Domestic Labour, and Prostitution* (Foundation Against Trafficking in Women 1997) 86.

⁵³ Kevin Bales, *Understanding Global Slavery: A Reader* (University of California Press 2005) 130-131.

individual, although it later results in exploitation of the trafficked person. In such cases, the victim agrees to being trafficked, however, he has minimal awareness of the exploitation that awaits him/her. Since coercion is a means of trafficking, trafficking in human beings and forced migration are interrelated issues.⁵⁴

Many people globally have been forced to leave their homeland due to adverse financial or political conditions. In such cases, forced migration is said to have taken place. Interestingly, similar conditions are also applicable to trafficked victims, who usually flee from their homeland in response to unstable conditions and poverty. Both groups are categorized as asylum seekers, refugees, and internationally displaced persons.⁵⁵

Furthermore, trafficking in human beings relates to various kinds of coercive forces and different types of exploitation. This researcher asserts that one of the major causes of the ever-increasing status differences between the rich and the poor is the presence of non-uniform development across different states. This explains why under-skilled personnel tend to move from poor states to richer ones to realize better economic prospects.⁵⁶ These richer states show an upward trend in terms of development, and hence, low-skilled labour tends to be attracted to such places, which in turn are considered a threat to the richer countries. The push-pull rule justifies this action, as poor labourers tend to move toward areas where they are paid better. They face the turmoil of poverty and unemployment at home, and so choose to leave, becoming labour migrants. In 2010, there were about 214 million immigrant labourers, of which 61 million were in Asia and 70 million in the EU. It is suspected that this number will increase with increased globalization.⁵⁷

In today's world, international migrants' motives are quite varied and complex. The position, direction and timing of migration contribute to this complexity. Variations

⁵⁴ ILO, *Forced Labour Report 2005*, para 39.

⁵⁵ Stephen Castles, 'Towards a Sociology of Forced Migration and Social Transformation' (2003) 37(1) *Global Refugees* 13, 14.

⁵⁶ See further discussion in Nicola Piper, 'Feminization of Labour Migration as Violence Against Women: International, Regional and Local Nongovernmental Organization Responses in Asia' (2003) 9(6) *Violence Against Women* 723, 723-742.

⁵⁷ United Nations Economic and Social Affairs (UNESA), *Report of International Migration 2009: A Global Assessment* (UN 2011) xviii-xix. These statistics have increased by 58 million since 1990; *ibid*.

have given rise to skilled immigrants, students, forced labour, refugees, asylum seekers, contract workers, workers of irregular status, and trafficked victims.

Despite developed countries requiring labourers to assist their development, the routes for legal migration are somewhat inadequate. Many receiving states place restrictions on such movements in order to protect their state's integrity and sovereignty, and to protect their own labour markets. In the EU, migration policies aim to protect so-called 'Fortress Europe', and are applied to prevent an influx of non-European citizens.⁵⁸ As a consequence, indulging in human trafficking and smuggling is considered a dangerous act in these regions. In addition to this, these two activities have brought about considerable change in the kind of migration and exploitation taking place. Such exploitation is more profound in the sex industry, illegal drug distribution, and domestic labour, and affects more women than men.⁵⁹ These evil practices against women have long been condemned, and this is why the UN Trafficking Protocol specifically reflects the need to extend protection to these women.

A significant international issue is the growth in forced labour because of human trafficking. According to the ILO, about \$21 billion was paid by victims of forced labour to the organized crime gangs or others exploiting them.⁶⁰ In Chapter 7 the issue of labour exploitation is discussed in the context of its regulation by the ILO. The ILO has established two Conventions⁶¹ in order to prohibit forced labour by law, with regard to human trafficking.⁶² In 1930, the ILO Forced Labour Convention provided the first

⁵⁸ Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart 2007) 73-80.

⁵⁹ For example, the UK has seen an explosion of large-scale, commercial production of cannabis over the last four years. According to the Association of Chief Police Officers (ACPO) Report, the number of cannabis farms has more than doubled. In 2011/12 there were 7,865 farms compared to the 2007/8 baseline figure of 3,032: ACPO, *UK National Problem Profile: Commercial Cultivation of Cannabis 2012* (April 2012) 3.

⁶⁰ UNODC, *The Globalization of Crime: A Transnational Organized Crime Threat Assessment* (UN 2010) 39.

⁶¹ 1930 ILO FL Convention [as of 20 November 2012, there are 175 State Parties] and ILO, (C105) Abolition of Forced Labour Convention 1957 No 105, 320 UNTS 291 [1957 ILO AFL Convention] (adopted 25 June 1957, entered into force 17 January 1959). As of 20 November 2012, there are 172 State Parties.

⁶² ILO Constitution 1972 (adopted 22 June 1972, entry into force 1 November 1974), art 19(8). As of 20 November 2012, there are 185 member states of the ILO.

global understanding of forced labour.⁶³ The Convention defined forced labour as an act of compulsion and intimidation, and maintained that there is a link between slavery and forced labour. It commanded all state parties to take the necessary preventative measures to counter this activity,⁶⁴ and stated that involvement in forced labour should be a criminal offence.⁶⁵

Furthermore, the ILO implemented the 1957, ILO Abolition of Forced Labour Convention in order to improve the labour environment. It aimed to bring an end to forced labour for financial and political purposes, for discrimination, for labour discipline, or as a punishment.⁶⁶ The Convention was applicable to all forms of work and levels of employments, including government, public and private sectors. It is necessary to utilize both ILO Conventions to fully address the issue of forced labour, to prevent it from turning into slavery, and to safeguard the rights of victims.

3.4.1 Migration and Forced Labour

Migrants are one of the main groups affected by forced labour in both the KSA and UK. A number of regular migrants are given jobs with low pay and undesirable living conditions.⁶⁷ There is an option for employers to exploit their employees due to their uncertain immigration status and immigration strategies. In addition, failure to offer access to authorized jobs leaves migrants with no choice but to succumb to forced labour.

Forced labour is not just the responsibility of a single entity but rather a collection of conditions and circumstances.⁶⁸ The complex nature of forced labour should be used to express and describe the various manipulative situations that workers must face. Thus, we can assess how uncertain immigration status and immigration strategies lead

⁶³ Protocol to Convention 29 - Protocol to The Forced Labour Convention, 1930, adopted by the International Labour Conference (ILC) Conference at its 103rd Session, Geneva, 11 June 2014 as the Protocol of 2014 to the Forced Labour Convention, 1930

⁶⁴ Forced Labour Conventions, art 1(1).

⁶⁵ *ibid* art 25.

⁶⁶ Abolition of Forced Labour Convention, arts 1-2.

⁶⁷ Gary Craig, “‘Cunning, Unprincipled, Loathsome’: The Racist Tail Wags the Welfare Dog’ (2007) 36(4) Journal of Social Policy 605–623.

⁶⁸ Klara Skrivankova, ‘Between Decent Work and Forced Labour: Examining the Continuum of Exploitation’ [2010] Joseph Rowntree Foundation 4.

to irregular migrants becoming victims of compulsion and persecution. The significance of trafficking and the part it plays in encouraging forced labour has been widely accepted.⁶⁹

A conventional and widely known definition of forced labour is the International Labour Organization's (ILO) Forced Labour Convention 1930. This states that forced labour refers to any kind of work that a person is made to do under threat or subject to force.⁷⁰

According to this approach, forced labour is said to: involve the use of sexual, physical and psychological violence; prevent the individual's movement; create a debt of bondage (a condition where an employee is supposed to work to pay off debt, which keeps on increasing due to the food and shelter he is given, which is charged by the exploiter at a very high rate); involve a refusal to pay employees; and involve the confiscation of legal identification documents (similar to the *Kafala* system in Saudi Arabia).⁷¹

It can be said that forced labour begins with deception and then transforms to become force and compulsion.⁷² This has been reported by Skrivankova,⁷³ according to whom practices begin with simple work involving major and minor abuses of the law, and eventually results in dangerous levels of forced labour.

An immigration policy which makes it simpler for immigrants to gain entry to and work in both the KSA and the UK⁷⁴ would better serve employer's needs for labour. This would also lessen the chances of employees becoming subject to forced labour. It is

⁶⁹ Christien Van den Anker, 'Rights and Responsibilities in Trafficking for Forced Labour: Migration Regimes, Labour Law and Welfare States' [2009] Web Journal of Current Legal Issues <<http://eprints.uwe.ac.uk/12725/1/vandenankerlegalissues.pdf>> accessed 25 January 2014.

⁷⁰ ILO FL Convention No 29 (1930).

⁷¹ ILO, *Human Trafficking and Forced Labour Exploitation: Guidelines for Legislation and Law Enforcement* (ILO 2005).

⁷² Bridget Anderson and Ben Rogaly, 'Forced Labour and Migration to the UK' (Study Prepared by COMPAS in Collaboration with the Trades Union Congress, 2005) 39 <<https://www.tuc.org.uk/international/tuc-9317-f0.pdf>> accessed 23 May 2013.

⁷³ Skrivankova (n 68) 4.

⁷⁴ Peter Dwyer and others, 'Forced Labour and UK Immigration Policy: Status Matters?' (2011) JRF <<http://www.jrf.org.uk/sites/files/jrf/forced-labour-immigration-status-full.pdf>> accessed 15 April 2014.

important that migrant status should be provided to irregular immigrants to protect them from deportation and so to allow them to evade forced labour situations.⁷⁵

The important point here is that all regular or irregular migrants should be sufficiently empowered to pursue complaints against their employers in an employment tribunal.⁷⁶ This would essentially allow migrants in situations of forced labour to file complaints for non-payment of wages, along with other forms of maltreatment. By removing the 'doctrine of legality',⁷⁷ the position of the migrants could be strengthened, thereby encouraging migrants to take legal action and report cases of forced labour. This is important because apart from simply achieving justice for workers, it would raise awareness among employers that they are not exempt from repercussions, and so act as a restraint.⁷⁸

In addition access to information regarding rights and entitlements of migrants must be ensured from the moment they enter the country (or even before, via certain educational campaigns in their country of origin), and in addition civil societies and organizations to support and advocate for migrant rights must be established⁷⁹ to refine the knowledge of migrants about their rights and entitlements. This is vital to the process of improving knowledge that will support the migrant community. Furthermore, the visa-issuing process could be utilized by both the KSA and the UK Home Office to insure that the migrants are well informed of their rights before they enter the UK or the KSA.⁸⁰

3.5 HUMAN TRAFFICKING IN THE CONTEXT OF HUMAN RIGHTS

Human trafficking is not only a crime against state and society, as per the definition in international criminal law, but also as a crime against humanity itself, when used as a

⁷⁵ *ibid.*

⁷⁶ *ibid.*

⁷⁷ Skrivankova (n 68).

⁷⁸ Mumtaz Lalani, *Ending the Abuse: Policies that Work to Protect Migrant Domestic Workers* (Kalayaan 2011).

⁷⁹ Peter Dwyer and others (n 74).

⁸⁰ *ibid.*

weapon of war.⁸¹ Such issues have always been linked to the violation of human rights.⁸² Ever since the 1950s, the trafficking of humans has been countered by a variety of regional and international human rights' interventions, many of which have been of great interest to international human rights organizations, including the counter-measure strategies levied against it by the UN, ranging from plans, conferences, actions and declarations, like the 1948 UDHR. The 1948 UDHR and the UN Trafficking Protocol aim to meet the same goal, which is to guarantee the right to life, equality, freedom and abolition of slavery.⁸³ The Protocol states that its objective is to safeguard the victims of trafficking and by extension their internationally recognized human rights, which clearly illustrates that the act of trafficking is, in reality, an abuse of human rights.⁸⁴ Further action against these crimes has been taken, through interventions and agreements at both regional and international level, because of the violence against women, violation of children's rights and the extent of trafficking related prostitution among other crimes.

Victims of trafficking are considered refugees in the international law of human rights, which gives them legitimate rights, including protection.⁸⁵ Several human rights interventions have been made available to address traffickers' human rights. Contracting States have been urged to put an end to violence in all forms related to the trafficking and the exploitation of women, which also include forced prostitution, and taking whatever course is necessary, including legislation, to end atrocities and discrimination against women as per the Convention on the Elimination of All Forms of Discrimination against Women 1979 (CEDAW).⁸⁶ Following on from this, the first international treaty to move specifically to take action against child labour and to ban the trafficking of children for prostitution and the prevention of their sexual

⁸¹ The Rome Statute, art 7(1) enumerates acts that 'when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack' constitute a 'crime against humanity'.

⁸² Maggy Lee, 'Introduction: Understanding Human Trafficking' in Maggy Lee (ed), *Human Trafficking* (Willan 2007) 9.

⁸³ UDHR 1948, arts 2 and 3.

⁸⁴ UN Trafficking Protocol, art 2(b).

⁸⁵ Twomey (n 48) 3.

⁸⁶ Art 6 of the Convention on the Elimination of All Forms of Discrimination Against Women, of which both the UK and KSA are members.

exploitation was the Convention on the Rights of the Child 1989 (CRC).⁸⁷ Special protection is to be afforded to child victims by state parties.⁸⁸ Furthermore, the International Covenant on Economic, Social and Cultural Rights 1966 (1966 ICESCR)⁸⁹ undertook to a special decree to prevent children from social and financial exploitation.⁹⁰

Moreover, at the regional level, the 2000 EU CFR⁹¹ specified the need for the suppression of trafficking in human beings,⁹² a ban that was further strengthened by the COE Trafficking Convention.⁹³ In order to combat the trafficking of persons in, *inter alia*, Saudi Arabia, a common system was adopted by the Co-operation Council for the Arab States of the Gulf (GCC).⁹⁴ In the Saudi system, this has been supplemented by related conventions and the adoption of other instruments, which will be critically analysed in Chapter 6 of this thesis.⁹⁵ Aside from these examples, the UN Trafficking Protocol mentions the protection of the rights of trafficked victims. The UN Trafficking Protocol clearly safeguards internationally recognized rights.⁹⁶ Indeed, this is one of the core purposes of the Protocol. The provisions provided to protect the victims under the Protocol⁹⁷ make it clear that the international community views trafficking as a human rights issue. This proves the need to offer a supplementary human rights framework to underpin existing global actions against trafficking.

Human rights were almost absent in the past in reference to practices of slavery and the slave trade, which has led to the formation of international instruments to protect everyone's personal rights. These include combating all forms of human trafficking

⁸⁷ Art 35 of the Convention on the Rights of the Child, of which both the UK and the KSA are members.

⁸⁸ Jacqueline Bhabha, 'Children, Migration and International Norms' in Tomas Alexander Aleinikoff and Vincent Chetail (eds), *Migration and International Legal Norms* (TMC Asser Press 2003) 219.

⁸⁹ UN, 993 UNTS 3, UNGA Res 2200A (XXI) (adopted 16 December 1966, entered into force 3 January 1976).

⁹⁰ International Covenant on Economic, Social and Cultural Rights 1966, art 10(3).

⁹¹ EU [2000] OJ C 364/1 (adopted 7 December 2000). The Charter became legally binding when the Treaty of Lisbon entered into force on 1 December 2009, as the Treaty confers on the Charter the same legal value as the Treaties).

⁹² Art 5(3).

⁹³ Art 1(1).

⁹⁴ Co-operation Council for the Arab States of the Gulf (GCC), Abu Dhabi Document System (Law) Consolidated to Combat Human Trafficking for the GCC, final communiqué of the twenty-seventh session, 9-10 December 2006.

⁹⁵ The adoption of the common system to combat trafficking in persons for the GCC on 2007 and 2011.

⁹⁶ The Preamble and art 2 of the UN Trafficking Protocol.

⁹⁷ Arts 6-8.

that go against the norms of human behaviour. The methods related to human rights, and other international instruments, are not only to be taken to protect individuals, but demand a full commitment from states to impose a mechanism to focus on and seek to end the phenomenon. It is these frameworks that view the trafficked person as a victim, whose human rights have been breached,⁹⁸ rather than a criminal in violation of national regulations and immigration laws.⁹⁹ In addition, human rights frameworks establish methods by which to recognize a victim's situation, so that the difference between trafficking and smuggling etc, can be identified, and legal action taken while the victim is protected. Hence, the causes, motives for, and results of the trafficking of humans in countries of destination, transit and origin are also addressed under existing human rights frameworks.

However, it is not easy to apply the rules and principles of human rights globally. The UNCHR has issued several statements and recommendations in the context of violation of human rights, which have not been entertained by some countries because of the lack of direct coordination with the UN.¹⁰⁰ The lack of political will, shown by some States on the implementation of human rights obligations in conjunction with human trafficking, is often argued to be because they do not view trafficking as an international crime, as per the international criminal law,¹⁰¹ and for that reason are seeking to dissuade other countries from participating in banning this practice. Although several human rights instruments were established before the UN Trafficking Protocol against human trafficking, the majority were not thoroughly entertained, specifically those requiring States to take preventative measures, produce effective enforcement mechanisms, and cooperate in the fight against human trafficking. The implementation of this practice is diversified in individual states, because of the various ways in which human trafficking is legislated by States.

⁹⁸ Art 26 of the Basic Law of Governance in the KSA: 'The State shall protect human rights in accordance with the Islamic Shari'a.'

⁹⁹ Obokata (n 51) 35.

¹⁰⁰ Mark Lattimer, 'Enforcing Human Right Through International Criminal Law' in Mark Lattimer and Philippe Sands (eds), *Justice for Crimes Against Humanity* (Hart 2003) 388.

¹⁰¹ Obokata (n 51) 36.

From the perspective of human rights, it is appropriate to weigh both respect for defendant's human rights and the efficiency of the law equally. The possibility of a perfect world is distant.

However, many states will seek to target victims of trafficking as part of the anti-trafficking strategies put in place to enforce measures and insure traffickers' prosecution by punishing them without considering their rights.¹⁰² The majority of books and articles emphasize the prevention of trafficking and the prosecution of traffickers, also emphasizing protection for victims, without exploring their stories in depth. A significant change is required to the conventional approach to trafficking globally. As such, the participation of victims in judicial proceedings and investigation against traffickers will help provide justice to everyone involved, in view of human rights.¹⁰³ Allowing (but not requiring) victims to confront traffickers is thought to be one of the chief rights of the defendant, as justice demands that an innocent person (the victim in this case) should be protected until proven guilty by a properly constituted tribunal. It is a task appointed to the decision-makers of states to take into account the security of the state equally, as well as the human rights of victims and traffickers.

When viewing the issue from the perspective of an exploited victim of trafficking, highlighting the exploitative nature of trafficking would be an appropriate way to guide legislative discussions and policies within a human rights framework. By considering the legal standards that constitute 'just and favourable' free labour working conditions 'worthy of human dignity' for both sexes, 'fruitless debate' regarding consent, and prostitution, in the context of trafficking, can be avoided as human and labour rights are intertwined.¹⁰⁴ A human rights framework can then be provided by scrutinizing labour practices and offering privilege to the exploited person. Therefore, enforcement of human rights is publicized and the success of anti-trafficking legislative policies measured; not only in regard to their effectiveness when allowing trafficked victims to

¹⁰² Joan Fitzpatrick, 'Trafficking as a Human Rights Violation: The Complex Intersection of Legal Frameworks for Conceptualizing and Combating Trafficking' (2002) 24(4) *Mich J Intl L* 1143, 1155.

¹⁰³ As discussed further in Chapter 4.

¹⁰⁴ Jane E Larson, 'Prostitution, Labour, and Human Rights' (2004) 37(3) *UC Davis L Rev* 673, 698-699.

obtain compensation for violation of their rights, but also in terms of making the crimes known through public prosecution.¹⁰⁵

The unequal status of women and girls in some countries, has sometimes allowed them to be viewed, because of misguided stereotyping, as (sexual) objects, servants and the property of men, something that is often taken advantage of by traffickers.¹⁰⁶ It also can lead to less education and fewer training opportunities for women and girls. Gender discrimination is a risk, furthering trafficking; it is also recognized as a refusal of fundamental human rights. Rights to healthcare, life, liberty and escape from all forms of slavery are some of the other rights violated. It is the right of children to grow up safe without being exploited or abused, and to be properly educated. Human rights violations are both a cause and a consequence of human trafficking.¹⁰⁷

Many transnational corporations, restaurant owners, farmers and others have exploited victims of trafficking in destination states, where they have to work long hours against their will on minimal pay so that they can pay off debts imposed by traffickers, elevating the problems of slavery and forced labour. A frequently related issue is concern over the conditions in which victims are kept. For example, those employed in the agriculture sector might be exposed to harmful chemicals, thereby risking their safety. Therefore, the right to a favourable and just environment at work is often denied. Victims commonly refrain from seeking medical assistance because of their illegal status and fear of law enforcement. Furthermore, reports of physical, sexual or mental abuse, especially against women have been noted.¹⁰⁸ Moreover, victims are not afforded freedom of movement. In order to attain dominance over trafficked persons, traffickers often take away identity documents,¹⁰⁹ or lock them in

¹⁰⁵ Kathleen Kim and Kusia Hreshchyshyn, 'Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States' (2004) 16(1) *Hastings Women's LJ* 1, 12.

¹⁰⁶ Amy O'Neill Richard, 'International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime' (1999) *Centre for the Study of Intelligence* 1.

¹⁰⁷ Noeleen Heyzer, 'Combating Trafficking in Women and Children: A Gender and Human Rights Framework' (Working Paper at the Human Rights Challenge of Globalization: Asia-Pacific-U.S. the Conference, 13-15 November 2002, Hawaii) 11
<http://www.childtrafficking.org/pdf/user/unifem_gender_and_human_rights_framework.pdf>
accessed 22 June 2014.

¹⁰⁸ UNCHR, 'Report of the Secretary-General on Violence against Women Migrant Workers' (9 December 1999) UN Doc E/CN.4/2000/76.

¹⁰⁹ UNCHR, 'Report of the Special Rapporteur on the Human Rights of Migrants: Migrant Workers' (6 January 2000) UN Doc E/CN.4/2000/82, para 63.

factories, sweatshops and brothels, intimidating them by blackmailing them with enforcement actions or retaliation against members of their family.¹¹⁰

Furthermore, in states where destination states' xenophobia and racism are significant human rights issues, traffickers have tried to justify the exploitation of trafficked victims for sex and forced labour by citing racism and xenophobia.¹¹¹ Trafficked victims are often termed as 'illegal immigrants', which imposes negative connotations upon them in many places, also sometimes resulting in racism and violence. In many destination states, illegal immigrants are also linked to deterioration of the country's healthcare, social security system and education systems.¹¹² Again, the illegal status of immigrants hinders the reporting of acts of violence and racism against them, meaning perpetrators are rarely brought to justice. Thus, the fundamental rights of these victims are routinely denied.

Several human rights concerns have been highlighted regarding law enforcement practices in destination states. For example, instances of direct shooting by law enforcement agencies, resulting in injury or death at borders have also been reported.¹¹³ Some enforcement officers, while making arrests, demand sexual or monetary favours in exchange for a victim's release, with refusal to comply resulting in prolonged detention.¹¹⁴ Trafficked victims are often kept in unhygienic places,¹¹⁵ and instances of torture¹¹⁶ have also been reported. Moreover, other rights, which include the right to be informed of the charges one is accused of, the right to have access to

¹¹⁰ UNCHR, 'Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms Radhika Coomaraswamy, on Trafficking in Women, Women's Migration and Violence against Women' (29 February 2000) UN Doc E/CN.4/2000/68, para 39.

¹¹¹ Bridget Anderson and Julia O'Connell Davidson, *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study* (IOM 2003) 42.

¹¹² UNCHR, 'Report of the Special Rapporteur on the Human Rights of Migrants: Migrant Workers' (9 January 2001) UN Doc E/CN.4/2001/83, para 69.

¹¹³ UNCHR, 'Human Rights of Migrants: Report of the Mission to the Border Between Mexico and the United States of America [7-18 March 2002]' (30 October 2002) UN Doc E/CN.4/2003/85/Add.3, paras 27- 29.

¹¹⁴ UNCHR, 'Report of the Special Rapporteur on the Human Rights of Migrants: Migrant Workers' (30 December 2002) UN Doc E/CN.4/2003/85, para 22; UN Sub-Commission on the Promotion and Protection of Human Rights, 'The Rights of Non-citizens: Progress Report of the Special Rapporteur, Mr David Weissbrodt, submitted in accordance with Sub-Commission decisions 2000/103 and 2001/108, as well as Commission decision 2002/107: Addendum - Examples of practices in regard to non-citizens' (3 June 2002) UN Doc E/CN.4/Sub.2/2002/25/Add.3, para 4.

¹¹⁵ *ibid* paras 58 and 61.

¹¹⁶ UNCHR, 'Report of the Special Rapporteur on the Human Rights of Migrants: Migrant Workers' (9 January 2001) UN Doc E/CN.4/2001/83, para 82.

interpreters, legal advice, assistance from one's consulate, or access to judicial proceedings are often absent or restricted.¹¹⁷ Evidently a wide variety of human rights concerns impinge on cases of human trafficking.

A key concern, as noted by this researcher, is that whoever deals with the victims should be concerned about their basic rights. The shift of focus towards human rights promotion rather than criminal sanctions is important in many cases. The promotion of human rights should make the consequences of trafficking known. Therefore, victims should not be used to prosecute traffickers or prevent crimes as this is an unfair requirement and illegal.¹¹⁸ It is only when people can realize or secure their rights that they become real. It is a better policy to enable the victims of human trafficking to be able to voice their grievances and act of their own free will, because when implementing a human rights-based approach it is imperative that empowerment and participation take place. In order to prevent public institutions and law enforcement agencies from exploiting trafficked victims, support for principles of human rights have been set in place to help people take control of their life, and decrease the risk of re-trafficking. In addition, this can assist in trials against traffickers on one front and on the other can protect the rights of victims, which gives a huge incentive to offer evidence to authorities. However, the prevalence of discriminatory practices, along with insufficient targeting of specific support and help, often prevents women from going to authorities, as they fear this may result in further abuse and renewed victimization.¹¹⁹

Finally, an approach targeting the human rights stance against trafficking measures may infringe upon or have adverse effects on the rights of the victims of trafficking or other affected groups. This approach demands anti-trafficking policies are promulgated with human rights at their core, as they are able to amalgamate principles of indivisibility, universality and non-discrimination.

¹¹⁷ See (n 114).

¹¹⁸ The Organisation for Economic Co-operation and Development (OECD), 'Trafficking in Persons as a Human Rights Issue' (June 2008) <<http://www.oecd.org/dac/gender-development/44896390.pdf>> accessed 8 July 2014.

¹¹⁹ *ibid.*

3.6 HUMAN TRAFFICKING IN THE CONTEXT OF ORGANIZED CRIME

Another feature of contemporary human trafficking is that in many cases it is also a form of transnational organized crime. In terms of scope, human trafficking is second only to drugs and arms trafficking; it is also one of the most lucrative forms of organized crime, in part due to the low risk of capture and punishment, and the potential for high rewards.¹²⁰ One of the major problems encountered, when addressing the issue of human trafficking, is its ties with organized crime. It now represents a considerable challenge to developing and undeveloped countries, one that needs to be encountered at both national and regional levels.¹²¹ Organized crime is conventionally associated with the Mafia, and although recognized as a source of danger, was previously limited to single regions, operating within countries. Recently, however, it has metamorphosed, resulting in the creation of a more present threat to the international community.¹²² A series of lifestyle changes have occurred at the political, social and economic level since the end of 20th century, in response to major advancements in the field of technology. Due to globalization, international restrictions on the movement of goods, capital and services have been reduced, leading to an increase in both legal and illegal activities across states.¹²³ One such illegal activity is organized crime,¹²⁴ as a result of which, black markets and corporate illegality have been increasing.¹²⁵ For instance, in 2009 transnational organized crime was believed to have generated an estimated \$870 billion, which amounts to 1.5% of global GDP.¹²⁶

¹²⁰ Louise Shelley, 'Trafficking in Women: The Business Model Approach' (2003) 10(1) *Brown J World Aff* 119, 121.

¹²¹ International Centre for Migration Policy Development (ICMPD), *The Relationship Between Organized Crime and Trafficking in Aliens* (ICMPD 1999) 5.

¹²² Sherif Sayed Kamel, *Organized Crime in Comparative Law* (Al Nahda Al Arabia House 2001) 21.

¹²³ Andreas Schloenhardt, 'Organized Crime and the Business of Migrant Trafficking' (1999) 32(3) *Crime, Law and Social Change* 203, 219.

¹²⁴ Phil Williams and Gregory Baudin-O'Hayon, 'Global Governance, Transnational Organized Crime and Money Laundering' in David Held and Anthony McGrew (eds), *Governing Globalization: Power, Authority, and Global Governance* (Wiley 2002) 141.

¹²⁵ Gianluca Fiorentini and Sam Peltzman (eds), *The Economics of Organised Crime* (CUP 1995) 2.

¹²⁶ UNODC, *Report of Estimating Illicit Financial Flows Resulting from Drug Trafficking and other Transnational Organized Crimes* (UNODC 2011) 7.

The increasing problem of transnational organized crime resulted in the UN TOC Convention, and its two subsequent supplementary Protocols - the UN Trafficking Protocol and the UN Smuggling Protocol – which are the chief international instruments employed to fight such crimes. Despite the seriousness of organized crime and various studies at both national and international levels, a proper definition has not yet been unanimously agreed upon in either legislation or jurisprudence.¹²⁷ An example of this can be seen in the TOC Convention, which only defined the form of the crime without establishing a definition of it.¹²⁸ It described a type of organized criminal group consisting of three or more people working together with the intention of committing serious crimes,¹²⁹ so that they may acquire benefits directly or indirectly.¹³⁰ The aforementioned group is not usually formed to commit random impulse crimes, nor are they required to have a formal form or proper structure.¹³¹ As seen from the definitions, organized crime is not restricted to a single incidence of criminality, but rather applies to various forms of criminal activity taking place under special circumstances, that ultimately combine to be called organized crime because an organized criminal group has committed them in order to realize specific goals by working together.

As an example of such a group we can mention the Chinese Triads, which have had a hand in international drug, money laundering, security, and prostitution, since the seventeenth century. Another example is the *Yakuza* in Japan, who have been involved in drug trafficking, arms smuggling, prostitution and banking fraud since the eighteenth century.¹³² As a result, advancements in the methods used by organized criminal groups in different fields have contributed to an increase in the incidence of

¹²⁷ Letizia Paoli, 'The Paradoxes of Organized Crime' (2002) 37(1) Crime, Law & Social Change 51, 60.

¹²⁸ Art 2.

¹²⁹ Serious crime 'shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty': art 2(b).

¹³⁰ Art 2(a).

¹³¹ Art 2(c).

¹³² Amy O'Neill Richard, 'International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime' (1999) Centre for the Study of Intelligence 1.

the crime of human trafficking from a conventional form to a more modern one, as new ways emerge to achieve illegal immigration.¹³³

From an economic perspective, business conducted by organized criminal groups usually relates to illegally sold goods or items. Consequently, human trafficking then qualifies as a potential revenue stream, whereby the commodity to be sold and bought is a person, depending upon supply and demand, presenting a business opportunity where transactions that may further involve a product, a market and a broker are possible.¹³⁴ Brokers are intermediary organized groups that facilitate trade, as a properly structured economic project. They closely mimic legal economic projects, and recruit a multinational workforce. This occurs because such brokers are situated in the country where 'the goods' originate, and hence, can transfer these goods (persons) with ease from the country of origin to the country of destination, where other brokers take custody of them, distributing them according to demand.¹³⁵

However, Mafia groups and illegal companies are not the only organizations dealing in human transactions. Other companies have grown up and taken root through proper legal channels; including textile and garment companies, construction, job recruitment agencies, and marriage consultant agencies situated abroad, to work at jobs involving prohibited activities, including the trafficking of humans for forced labour or sexual exploitation. These companies have worked under the shadow of a legal cover to show some form of legitimacy. In fact, some construction companies, recruiters and other agencies actually act as a cover for people seeking to engage in illegal activities. For example, they may provide assistance when organizing a visa for customers and thereby evade illegal trafficking.¹³⁶ Organized crime is not only carried out at a company level, but is also undertaken by families, friends and relatives who assist in trafficking in some areas. For instance, the selling of children in India and Thailand¹³⁷ is not only done for financial benefits, but also because their culture has been hijacked

¹³³ International Centre for Migration Policy Development (ICMPD), *The Relationship Between Organized Crime and Trafficking in Aliens* (ICMPD 1999) 16.

¹³⁴ Susie Adly Nashed, *Trafficking in Human Beings between the Gray Economy and Formal Economy* (New Dar of University 2005) 17-18.

¹³⁵ Schloenhardt (n 123) 213.

¹³⁶ Vincenzo Ruggiero, 'Trafficking in Human Beings: Slaves in Contemporary Europe' (1997) 25(3) *Intl J Sociology L* 231, 236-238.

¹³⁷ Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff 1998) 326.

by traffickers. Therefore, it could be said that organized criminals and related institutions are not the only ones facilitating trafficking.¹³⁸

Moreover, it has recently been observed that members of national armed forces and international peacekeeping forces have also been guilty of acts of trafficking.¹³⁹ In such cases, the level of sophistication that traffickers are involved in is comparable to that of organized criminal groups. For this reason, it can be said that the relationship between organized crime and trafficking does not entirely result in a comprehensive view of trafficking. However, a question that arises in this debate is whether organized criminal groups should be sentenced to a heavier punishment when compared to their individual counterparts in international organizations. This question is difficult to answer, as it carries a moral variable. Overall, the state should aim to focus more strongly on the seriousness of levels of organized crime in society.

As per the UN TOC Convention, when seeking to dispense with transnational criminal activities, money laundering instances are often criminalized, even when they are carried out by individual or corporate entities.¹⁴⁰ This process of ML is one of the ways in which traffickers manage to legitimize the money they earn through trafficking. As traffickers are almost always prosecuted for the charge of human trafficking, and not ML, this is one of the points worthy of consideration at present.

Human trafficking involves organization in terms of activities and finances. This process of trading humans across different countries can also be considered as a transnational crime. To deal with human trafficking, cooperation between states is required in order to dismantle these criminal organizations.¹⁴¹ Human trafficking is linked with organized transnational crimes in the UN Protocol.¹⁴² If continuity in human trafficking does not exist,¹⁴³ it is considered to be a single criminal act.¹⁴⁴ The vagaries of the definitions of

¹³⁸ Obokata (n 51) 32.

¹³⁹ UNESC, 'Integration of the Human Rights of Women and the Gender Perspective' (22 February 2003) UN Doc E/CN.4/2003/NGO/40, 1.

¹⁴⁰ Gallagher (n 44) 978.

¹⁴¹ Conny Rijken, *Trafficking in Persons: Prosecution from a European Perspective* (TMC Asser Press 2003) 87-89.

¹⁴² *ibid* 86.

¹⁴³ In the sense that the group is just created to commit one specific offence.

¹⁴⁴ Rijken (n 141) 68.

criminal organization by the UN and EU have made it difficult to implement proper law enforcement.

3.7 HUMAN TRAFFICKING IN THE CONTEXT OF MONEY LAUNDERING

Money laundering (ML) can be thought of as dirty money being moved through clean hands.¹⁴⁵ Usually, it is defined as the process by which a person can hide the existence of, illegal sourcing of, or application of income, and then employ means to make that income appear legitimate.¹⁴⁶

ML and THB go hand in hand. For example, the Bank of New York uncovered a scheme in August 1999 to launder \$10 billion using the Bank. The account in question was owned by traffickers linked with prostitution in Budapest, Poland and Prague.¹⁴⁷ Traffickers were seeking to convert the profits accumulated by the human traffickers into legitimate money or other assets. The preferred investment options for money from criminal activity for traffickers, is in cash intensive businesses including nightclubs or other types of exploitation. New methods are now in use to show how bank accounts are utilized to gain access to credit.¹⁴⁸ ML traffickers tend to utilize the business of money services or the financial institutions of *hawala* (a system of informal value transfer), such as Money Gram and Western Union. This money brokering network is spread mainly throughout South Asia, Middle East, North Africa and the Horn of Africa.¹⁴⁹ This system works in such a way that it permits *hawaladars* to transfer money to and from clients, across borders, to enable them to settle their debts with charges that are lower than those a normal financial institution would

¹⁴⁵ Lisa A Barbot, 'Money Laundering: An International Challenge' (1995) 3(1) Tulane J Intl & Comp L 161, 162.

¹⁴⁶ Presidential Commission on Organized Crime, *Report of the Cash Connection: Organized Crime, Financial Institutions, and Money Laundering* (National Criminal Justice Reference Service (NCJRS), October 1984) 7. More specifically, it is 'the process of converting quantities of cash – generally currency that has been tainted in some way – to a form that can be used more conveniently in commerce and ideally conceals the origin of converted funds.' - Herbert E Alexander and Gerald E Caiden, *The Politics and Economics of Organized Crime* (Lexington 1985) 39.

¹⁴⁷ Donna M Hughes, 'The "Natasha" Trade: The Transnational Shadow Market of Trafficking in Women' (2000) 53(2) J Intl Aff 625, note 6, p 642.

¹⁴⁸ G8's Financial Action Task Force (FATF), *Report of Money Laundering Risks Arising from Trafficking in Human Beings and Smuggling of Migrants* (FATF July 2011) 7.

¹⁴⁹ Jean B Weld, 'Current International Money Laundering Trends and Anti-Money Laundering Co-operation Measures' (2011) UNAFEI 146th International Training Course 39.
<http://www.unafei.or.jp/english/pdf/RS_No83/No83_08VE_Weld3.pdf>accessed 5 December 2013.

charge to send funds abroad.¹⁵⁰ It should be observed that a major portion of *hawala* activity is allowed. For instance, people in Pakistan are sent remittances by family members from the KSA and the UK. Until recently, the activities of Anti-Money Laundering (AML) have not been enough to end human trafficking through law enforcement. However, states require, as per the UN Trafficking Protocol and the UN TOC Convention, to criminalize the laundering of money acquired from human trafficking offences.¹⁵¹ As reliable AML and human trafficking typologies develop, events are slowly changing. Money trails usually end with the traffickers involved. However, the money and the trafficker may take entirely different routes.¹⁵²

As stated previously, making a profit is traffickers' main objective. One of the main organizations currently targeting terrorist financing and AML is the Financial Action Task Force (FATF).¹⁵³ The FATF has opined that people within law enforcement believe human trafficking is the greater offence, and this is why in many cases AML cases are not pursued. This focus on human trafficking rather than laundering has hampered the ability of authorities to put an end to this activity.¹⁵⁴ The Financial Intelligence Unit (FIU) which is set up in each member state (there are numerous FIUs in the UK) plays a crucial role in combating human trafficking.¹⁵⁵ However, the Organization for Security and Cooperation in Europe (OSCE's) Giammarino states that it is difficult to perform large scale financial investigations, and therefore this investigative tool is underutilized in human trafficking cases.¹⁵⁶ This results in a call for improved cooperation between specialised judicial and law enforcement agencies, especially in countries where profits

¹⁵⁰ Nikos Passas, 'Demystifying Hawala: A Look into its Social Organization and Mechanics' (2006) 7(1) *Journal of Scandinavian Studies in Criminology and Crime Prevention* 46, 52.

¹⁵¹ UN TOC Convention, arts 6 and 7.

¹⁵² Louise Shelley, *Human Trafficking: A Global Perspective* (CUP 2010) 138.

¹⁵³ The FATF is an inter-governmental body that develops and promotes policies to combat money laundering and terrorist financing, which was established in 1989. As of 20 November 2012, there are 36 members of the FATF; both the UK and KSA are members.

¹⁵⁴ G8's Financial Action Task Force (FATF) (n 148) 30.

¹⁵⁵ The FIU was established in the early 1990s in response to the need for a central agency to receive, analyse, and disseminate financial information to combat money laundering: International Monetary Fund, Legal Department, *Financial Intelligence Units: An Overview* (International Monetary Fund 2004) 1.

¹⁵⁶ Maria Grazia Giammarinaro, 'Trafficking in Human Beings: Integral Part of Organized Crime, Transnational Threat to Security - New Trends, New Challenges' (Workshop 'Enhancement of Interaction among Bodies of Sectoral Co-operation between CIS Participating States in Combating Organized Crime and Human Trafficking' (Moscow, September 2010) 6 <<http://www.osce.org/cthb/72359>> accessed 6 December 2013.

are reinvested and exploitation is taking place. Along with criminal investigations, financial investigation, as noted by the COE, 'remains crucial'.¹⁵⁷ Human trafficking is primarily a law enforcement issue. As such, the FATF believes that most instances of ML follow operational investigations into other areas of crime.¹⁵⁸

The ML techniques pursued in cases of human trafficking have not yet been identified. This has resulted in a lack of financial training and knowledge for investigators and prosecutors; restrictions on international cooperation; and a difficulty in accumulating evidence and detecting funds derived from ML processes related to human trafficking.¹⁵⁹ Hence, it is argued here, that the focus should not only be on human trafficking. If ML was tackled more effectively by law enforcement bodies, this would serve positively to counter human trafficking. Law enforcement might be easier in some respects were it controlled by organized crime. This could mean that if evidence was found against an organization in one area, their remaining criminal activities might also unravel. As such, successful prosecution of a ML system could help to take down the human trafficking system as well. Great dedication is required to eliminating ML arising from human trafficking, in both destination and origin States, through the provision of proper resources and appropriately trained financial investigators. ML and THB should be prosecuted and punished similarly.¹⁶⁰

3.8 HUMAN TRAFFICKING IN THE CONTEXT OF ONLINE ISSUES

In recent years there has been an increase in the utilization of online technologies in sex and labour trafficking. Using the Internet is a daily activity, through which people are able to apply for jobs, post ads, and interact via social networking sites such as Twitter, Facebook, Google Plus, etc. With an estimated population of 2 billion Internet users worldwide,¹⁶¹ there are at any given moment hundreds of millions of potential

¹⁵⁷ Europol, 'Trafficking in Human Beings in the European Union: A Europol Perspective' (June 2009) 10 <https://ec.europa.eu/anti-trafficking/publications/trafficking-human-beings-european-union-europol-perspective_en> accessed 29 June 2014.

¹⁵⁸ G8's Financial Action Task Force (FATF) (n 148) 39.

¹⁵⁹ *ibid* 30.

¹⁶⁰ Barry Vaughan and Shane Kilcommins, *Terrorism, Rights the Rule of Law* (Taylor & Francis 2013) 155.

¹⁶¹ International Telecommunication Union (ITU), 'The World in 2010, ICT Facts and Figures' (2010) <<https://www.itu.int/en/ITU-D/Statistics/Documents/facts/ICTFactsFigures2010.pdf>> accessed 12 September 2014.

customers roaming social networking sites. Websites such as *Craigslist*, are now recognized as susceptible to the targeting of recruits for trafficking, providing a source of victims. More than half of the American adult population of Internet users have been estimated to have applied for services via online classifieds.¹⁶² Traffickers have reported various instances where Craigslist, Backpage and MySpace have been used as mediums for recruiting people. Recently, a resident of Sacramento, Marvin Chavelle Eppes, 24, was given a 12-year and 7-month prison sentence to be followed by a supervised release for 10 years. The accused was charged with interstate trafficking of minors;¹⁶³ he accepted that he had utilized the services of MySpace to recruit as many as 16 sex-trafficking victims at a time. Increasing evidence is coming to light revealing that online resources, especially social networking sites are being used to recruit forced sex workers. This problem demands investigation, as the previously mentioned case was only unravelled after a rigorous examination by the Sacramento police and action by the FBI's Innocence Lost Task Force.¹⁶⁴ The challenge is to investigate the extent of the problem encountered by governments and UN, as has been acknowledged by the United Nations Office on Drugs and Crime (UNODC). The EU has been paid specific attention to this form of contemporary trafficking. The EU Eradication of Trafficking in Human Beings, 2012–2016, has been identified by O'Neill's report, *Trafficking in Human Beings and the Online Environment: A View of the EU Legal Framework*, as a kind of plan undertaken by the supranational union of countries to comprehend and take action against the issue of online recruitment for the intent of trafficking.¹⁶⁵ The Executive Director of UNODC, Yury Fedotov, accepted 'The Web literally opens a portal into your home and your children may be letting criminals in'.¹⁶⁶ The most common use of online social networking sites has been for human

¹⁶² Andrew Perrin, 'Social Media Usage: 2005-2015' (2015) Pew Research Centre <http://www.pewinternet.org/files/2015/10/PI_2015-10-08_Social-Networking-Usage-2005-2015_FINAL.pdf> accessed 20 October 2015.

¹⁶³ Federal Bureau of Investigation (FBI), 'Sacramento Man Sentenced to 12 Years and Seven Months for Sex Trafficking of a Minor' (8 November 2010) <<http://www.fbi.gov/sacramento/press-releases/2010/sc110810.htm>> accessed 13 September 2014.

¹⁶⁴ *ibid.*

¹⁶⁵ Maria O'Neill, 'Trafficking in Human Beings and the Online Environment: A View of the EU Legal Framework' (Human Trafficking and Online Networks Workshop 'Scottish Crucible and the Dundee University Space and Society Research Group', Dundee, September 2013).

¹⁶⁶ UNODC, 'Crime Commission to Address Protection of Children from Exploitation on the Web' (2011) <<https://www.unodc.org/unodc/en/frontpage/2011/April/crime-commission-to-address-the-protection-of-children-from-exploitation-on-the-web.html?ref=fs1>> accessed 14 September 2013.

trafficking, armed violence and maritime piracy. This problem is deep-rooted and assistance is required from technology companies and private businesses to introduce tools and techniques to counter web-based trafficking. While getting rid of the problem, private-sector technology firms might be able to learn the extent of the problem. On this subject, some esteemed researchers emphasize that 'these new communications and information technologies are facilitating the sexual exploitation of women and girls locally, nationally and transnationally'.¹⁶⁷ Policy institutions around the world have accepted that the 'growth of trafficking' due to the Internet has been 'unprecedented'.¹⁶⁸ The extent of the problem is apparent from the fact that in 2011, a report on Trafficking in Persons by the US Department of State, said that in the Republic of Korea more than 95% of 'commercial sexual abuse' of children was made possible by the Internet, despite the various national and international prohibitions on such activities, which aim to criminalize any breach to privacy.

European countries have shown the greatest concern in regard to the extent of this problem. Furthermore, in order to explore the problem, the EU took up the COE Convention on Action against Trafficking in Human Beings [CETS No 197] in 2005, appointing different research bodies. According to a report published by the COE, child and women traffickers utilize Internet technologies such as marriage agencies, online employment agencies, Internet chat rooms, pop-up ads and social networking sites to recruit children, girls and women for the purposes of trafficking. As per the COE study, the most advanced technology tools used by the traffickers included the World Wide Web, communications – Usenet newsgroup, email, bulletin or message boards, live synchronous communication (text/voice chat), live video conferencing (live video chat), webcams for the transmission of videos or images, streaming video, file sharing programs, peer-to-peer servers, peer-to-peer networks and file-swapping programs.¹⁶⁹

¹⁶⁷ Donna M Hughes, 'The Use of New Communications and Information Technologies for Sexual Exploitation of Women and Children' (2002) 13(1) Hasting's Women Law Journal 129 <http://www.uri.edu/artsci/wms/hughes/new_tech.pdf> accessed 14 September 2013.

¹⁶⁸ Council of Europe, *Group of Specialists on the Impact of the Use of New Information Technologies on Trafficking in Human Beings for the Purpose of Sexual Exploitation* (February 2003) 107.

¹⁶⁹ Athanassia P Sykiotou, *Trafficking in Human Beings: Internet Recruitment* (COE 2007) 26 Council of Europe <https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/trafficking_in_human_beings_internet_recruitment_1.pdf> accessed 15 September 2014.

3.9 CONCLUSION

This chapter has showed that criminal activity underpinning human trafficking is not something new, even if the legal definitions are. It was carried out even in the mid-nineteenth century in the form of slavery. Different forms of human trafficking have been discussed in this chapter in the context of present day slavery and forced labour migration, because coercion, force and exploitation are thought to be core elements involved in human trafficking. Specifically, women are more likely to be trafficked for prostitution and domestic labour, while men are more often trafficked with the intent of forcing them into physical labour or forced labour.

Current forms of human trafficking are no longer a one dimensional problem, but have become a multi-faceted social problem, which includes transnational organized crime, labour migration, social networking, and money laundering. Only some of these issues will be examined in depth in this thesis. The importance of the different terms 'human trafficking' and 'smuggling of migrants' has been emphasized, and human trafficking has also been examined as a migration issue. Human migration has become more complex because of the changes in migration prototypes and modern migration, possibly due to increases irregular migration. Human trafficking was analysed in the chapter and ultimately ruled out as a form of irregular migration. Even with the many terms in circulation suggesting human trafficking is linked to migration issues, whether 'illegal', 'irregular', or 'undocumented' migration, the researcher believes that the most appropriate term for use in this study is illegal migration.

The following chapter focuses on the legal responses to protection of victims of trafficking at both regional level (ie the COE Trafficking Convention) and international level (ie the UN Trafficking Protocol), to promote proper action against human trafficking at the global level. Certain obligations must necessarily be placed upon states regarding two main areas, which shall be elaborated on and critically analysed. The areas demanding investigation are legal action, punishment of traffickers, and the safeguarding of victims of trafficking. The coming chapter will analyse the protection of victims of trafficking in human beings in the international and regional level.

CHAPTER 4: COMBATING HUMAN TRAFFICKING AND PROTECTING VICTIMS UNDER INTERNATIONAL LAW AND REGIONAL AGREEMENTS

4.1 INTRODUCTION

It is a well-known fact that THB is a grave phenomenon that is growing at a very rapid pace and is increasingly threatening human rights with its progress.¹ The purpose of this chapter is to describe and analyse the international regulations enforced upon different States in order to fight this threat. The description presented in this chapter serves to act as an introduction to Chapters 5 and 6, which provides a detailed analysis of the actions undertaken by the governments of the KSA and the UK to fight this crime. Both countries are considered as good case studies for examination. The UK is part of the COE Trafficking Convention, whereas the KSA is part of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons. This explains the significance of the UN Trafficking Protocol and the COE Trafficking Convention in combating human trafficking. It is important for the member states to follow the regulations mentioned below, in light of the UN Trafficking Protocol and the COE Trafficking Convention. The 3Ps are relevant here and they are:²

1. Prevention and criminalization of human trafficking;
2. Prosecution thorough investigation and penalization of criminals; and
3. Protection of trafficked victims.

These are referred to as the Anti-Trafficking Framework.³

It is important to understand the link between the Trafficking and the UN Convention on Transnational Organized Crime (TOC) Convention, before describing the provisions mentioned above. The rules specified in the Convention are inclined towards being

¹ Kara C Ryf, 'The First Modern Anti-Slavery Law: The Trafficking Victims Protection Act of 2000' (2002) 34 Case W Res Intl L 45, 46.

² Klara Skrivankova, 'Translating Policy into Action to Support People who have been Trafficked' (Bringing Human Trafficking Out of the Shadows Conference, Cardiff, November 2012).

³ UN Trafficking Protocol, art 2 and the COE Trafficking Convention, art 1.

general,⁴ whereas the Protocol's are relatively specific.⁵ By comparing the two, a set of four rules can be established. First and foremost, the Protocol has not been created to function as an independent identity; instead, it is important for the States to ratify the Convention and then the Protocol.⁶ Nevertheless, ratification of the Convention by a State does not mean that it is bound by the Protocol, unless the State becomes a member of the Protocol.⁷ Second, it is important to interpret the Protocol and the Convention at the same time and understand the reason for which they were enacted.⁸ Third, the Convention's clauses are applicable to the Protocol and they are subject to modifications or interpretation only when required.⁹ Fourth, acts regarded as being criminal by the Convention must be viewed similarly by the Protocol.¹⁰ As a result, conditions laid down in the Convention (for example, for the protection of victims) must be applied by States in a more explicit, unambiguous and detailed manner.¹¹

An issue observed here is that the UN Trafficking Protocol does not give as much consideration as it should to victim protection provisions. In other words, it does not place a strong obligation on member states to ensure the protection of trafficked victims, unlike other measures which will be examined in later chapters.

The researcher believes that since the protection of victims is not comprehensive, it fails to receive the effective response from the member states. The researcher believes that there are several reasons for this. The UN Trafficking Protocol does not place sufficient obligation on the member states in terms of the protection of the victims of trafficking. In fact, protection of victims is not one of the preliminary steps of combating trafficking in the Protocol. For instance, article 6 only makes a small

⁴ Such as extradition and mutual legal assistance.

⁵ Such as offences established in accordance with the Protocol and provisions relating to travel and identity documents.

⁶ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UN 2004) para 253.

⁷ UN TOC Convention, art 37(3).

⁸ *ibid* art 37(4); UN Trafficking Protocol, art 1(1).

⁹ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UN 2004) para 254.

¹⁰ UN Trafficking Protocol, art 1.

¹¹ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UN 2004) para 254.

reference to the protection of trafficked victims, their identity and protection of their privacy, by the member states.¹²

Next, the provisions pertaining to protection lack a commanding tone. This still makes the basic protection of the victims valid, but makes advanced measures to provide security to these victims entirely optional under the protocol for the member states.¹³ This means that the member state is not obliged to provide social or housing assistance to these victims.¹⁴

Lastly, even though the victims are of special importance as witnesses of the crime of human trafficking, their security is often compromised. Consequently, the victims become hesitant in helping the law enforcement agencies, thus disrupting the entire machinery of the investigative system, as will be discussed later in this chapter.

4.2 ACTION: PREVENTION OF HUMAN TRAFFICKING

It has been mentioned in Chapter 2 that prevention and inhibition of human trafficking is part of international law, and therefore it is only sensible to include it in national legislation. Its inclusion would enable the protection of the victims present in a particular State. Supplementing the above-mentioned provisions, at a global level the following legal provisions are also important:

- The UN Trafficking Convention 1949¹⁵
- Convention on the Elimination of All Forms of Discrimination against Women 1979 (The EDAW Convention 1979)¹⁶
- Convention on the Rights of the Child 1989 (CRC 1989)¹⁷
- The Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (2000 OP/RSCP).¹⁸

¹² UN Trafficking Protocol, art 6(1).

¹³ *ibid* art 6(5).

¹⁴ *ibid* arts 6(3) and 7.

¹⁵ Arts 1-4.

¹⁶ Arts 6 and 12.

¹⁷ Art 35.

¹⁸ UN, 2173 UNTS 222 (adopted 25 May 2000, entered into force 12 February 2002), arts 1 and 3.

Regional Integration Associations also have supplementary provisions, too numerous to list here, but would include for example, at the EU level, the EU Charter of Fundamental Rights 2000,¹⁹ which will be analysed further in the UK chapter. The KSA has similar arrangements with both the GCC and countries on its key migration routes into the KSA, with the KSA being typically being a country of destination, rather than of transit or origin. This matter will be analysed further in next chapter of this thesis.

In recent times, the UN Trafficking Protocol has acquired immense importance in combating human trafficking by enforcing strict regulations on the member states, especially for the protection of women and children. It is arguable that there is a lacuna in the protection of men in the context of human trafficking at a global level. As per the UN Protocol, it is the responsibility of every member state to ensure the application of regulations and to take appropriate actions to criminalize human trafficking.²⁰

An important point to consider with respect to the criminalization of human trafficking is that it is not enough to criminalize only certain aspects of human trafficking (for instance, the use of coercion and intimidation against the victims). Rather, it is important to criminalize the entire notion of human trafficking as well as the provisions related thereto.²¹ Therefore, it is mandatory upon the member state to criminalize human trafficking in its entirety in its national regulations, irrespective of whether it is committed by individual traffickers or professional criminal groups,²² whether these be 'organized' crime gangs, as defined in various national, regional and global legal provisions, or entrepreneurial networks of criminals. For example, the regional COE Trafficking Convention states that understanding human trafficking in

¹⁹ EU [2000] OJ C 364/1 (adopted 7 December 2000). The Charter became legally binding when the Treaty of Lisbon entered into force on 1 December 2009, as the Treaty confers on the Charter the same legal value as the Treaties): art 5.

²⁰ UN Trafficking Protocol, art 3.

²¹ UNODC, *Toolkit to Combat Trafficking in Persons* (UNODC 2006) 31.

²² *ibid* xii; Hathaway identified the contribution of an organised criminal group as an extra necessary feature of the definition: James C Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49(1) *Va J Intl L* 1, 10.

terms of domestic laws is important in order to combat it at national and international levels.²³

Although the following provisions are taken from the COE Convention, their relevance applies to all human trafficking situations. The punishments for human trafficking need to meet the standards of effectiveness, justice, and persuasiveness,²⁴ including the way of extradition.²⁵ Moreover, together with penalties pertaining to human trafficking directly, all aggravating conditions must be taken into account. These include: criminal activities committed against children; executed by public officials during duty hours; or conducted as part of an organized crime gang.²⁶

Unfortunately, neither the Protocol nor the COE Convention sets a fixed threshold for the imposition of appropriate sanctions. As a result, the efficiency of international legislation with regard to combating human trafficking, at both the global and COE level, is highly compromised. At the regional level the EU has set minimum standards for the punishment of human traffickers, for its member states. This will be examined further in Chapter 5.

Moreover, along with criminalizing human trafficking and penalizing the offenders involved, the Protocol and the COE Convention both adopt a flexible approach that involves the prevention of this crime by enforcing instruments for the safety of victims and intensifying border control.²⁷ However, this author would argue that the implementation of these preventive measures is not given adequate importance by the regulatory authorities. As mentioned before, the reason behind this is that compliance with these measures is not mandatory, and hence they are overlooked or ignored by many member states. In article 9 of the Protocol, the provision of optional prohibition is stated as, 'States Parties shall establish comprehensive policies, programmes and other measures' to prevent trafficking in human beings. Article 5 of the COE Convention has a similar provision.

²³ COE Trafficking Convention, art 2.

²⁴ *ibid* art 23(1).

²⁵ *ibid*. However, art 11(1) of the UN TOC Convention provides that a sanction must be proportionate.

²⁶ COE Trafficking Convention, art 24.

²⁷ UN Trafficking Protocol, arts 9-13; COE Trafficking Convention, arts 5 and 7.

Todres argues that due to varying forms and levels of preventative measures, a disparity is seen in their application and hence why member states attempt to provide resources for the implementation of these measures together with the protection of victims of human trafficking.²⁸ It is permissible for a State to adopt a measure that has a limited approach towards the prevention of trafficking and the security of trafficked victims. However he goes on to say that this also limits the State in dealing with critical issues that allow human trafficking to take place.²⁹

The Protocol provisions for preventing human trafficking are not as strong as those in the COE Convention,³⁰ perhaps recognizing the fact that it is easier for a smaller rather than a larger number of countries to come to an agreement. Yet, according to Gallagher, while the COE Convention provisions are expansive, they lack meaning and substance.³¹ One of the aims of the COE Trafficking Convention is to bring about a decrease in the level of vulnerability of individuals, and thereby render them less susceptible to trafficking. Only certain aspects of this issue can be addressed by criminal law. It is important to reduce the degree of vulnerability of these individuals because circumstances such as poverty have long-term implications. Consequently, it is important for such financial and social measures to be constantly regulated by the State so as to ensure that preventative measures are at the required standard at all times. According to the researcher, the current provisions of the Protocol are not sufficiently thorough to deal with these long-term implications. Therefore, there is a dire need to set up a global legal framework, or if not, more effective regional legal frameworks, pertaining to the prevention of trafficking and ensuring the safety of individuals.

The COE Trafficking Convention demands that member states implement actions with regard to human rights that would help in determining the causes of human trafficking. This demand is not mirrored in the UN Trafficking Protocol, a weakness at

²⁸ Jonathan Todres, 'The Importance of Realising "Other Rights" to Prevent Sex Trafficking' (2006) NYU Law School, Public Law Research Paper No 06-17, 887 <SSRN: <http://ssrn.com/abstract=912250>> accessed 11 May 2014.

²⁹ *ibid.*

³⁰ Anke Sembacher, 'The Council of Europe Convention on Action against Trafficking in Human Beings' (2006) 14(2) *Tulane J Intl & Com L* 435, 442-445.

³¹ Ann T Gallagher, 'Recent Legal Development in the Field of Human Trafficking: A Critical Review of the 2005 European Convention and Related Instruments' (2006) 8 *Eur J Migration & L* 163, 184.

the global level. Moreover, the Convention also adopts the position that it is not possible for the member state to prevent this crime on its own, and that strong communication links must exist between different institutions to combat human trafficking and adopt preventative measures.³² These communication links need to be in a variety of areas, as exemplified by the EU approach to the issue, set out in the EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016.³³

The conclusion presented by the researcher is that human trafficking is a clear violation of human rights. It affects the freedom of individuals, with the law stating that no individual must be subjected to coercion or cruelty in any State.³⁴ At the COE level the ECtHR stresses this very clearly in the case of *Osman*.³⁵ According to the ECtHR, it is unlawful to interfere with the right to life of any individual,³⁶ and employing efficient criminal legislation is a good way to fight serious crimes such as human trafficking.³⁷ Thus it is clear that not only is it important to criminalize human trafficking, but it is equally important to ensure that it is punished.³⁸ It is also important is to include provisions for those who require protection as victims of trafficking, especially those who suffer harm.³⁹

Consequently, it would not be wrong to say that while crimes such as forced labour and slavery are strictly prohibited, it is equally important to prohibit the crime of human trafficking in the domestic law in terms of human rights, in the light of the law of *jus cogens*. Prevention and criminalization of human trafficking is part of international law, which also applies to criminal activities that violate human rights. The researcher believes that it is important for member states to share information, using transnational networks, and need to establish these networks where they do not

³² Sembacher (n 30) 442-445.

³³ EU, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2012) 286 final (19 June 2012).

³⁴ The Preamble of the 1948 UDHR; The Preamble of the 1990 UIDHR (adopted in Cairo, Nineteenth Conference of the Foreign Ministers of the Organization of Islamic Conference).

³⁵ *Osman v United Kingdom* [1998] 26 EHRR 357.

³⁶ ECHR, art 2.

³⁷ *ibid* para 115.

³⁸ Patricia Londono, 'Developing Human Rights Principles in Cases of Gender-based Violence: *Opuz v Turkey* in the European Court of Human Rights' (2009) 9(4) *Hum Rts L Rev* 657, 661.

³⁹ Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff 2006) 148.

already exist, along with lessons learned pertaining to this crime so as to assess the extent of this activity at national and transnational levels. All of this is important because it is the only positive way through which human trafficking can be prevented.

4.3 ACTION: PROSECUTION OF HUMAN TRAFFICKERS

It is necessary for the member state to prosecute and punish criminals involved in human trafficking. The relevant legislation emphasizes the significance of strict legal implementation. The term used in these Conventions for the process of enquiry, allegation and trial is 'prosecution'. The 1921 Traffic Convention requires the member state to implement actions required for discerning cases of trafficking and penalizing the offenders.⁴⁰ The Slavery Convention also punishes traffickers who have been convicted of violating national legislation.⁴¹ A similar obligation is found in the UN Trafficking Convention 1949,⁴² which also includes the prosecution of traffickers who have not been extradited and who have violated the anti-trafficking law of the requesting state.⁴³

The purpose of establishing a legal framework with regard to transnational criminal activities is to uncover these crimes, investigate them, and punish the criminals involved, so as to help the international law enforcement agencies to combat human trafficking. To make this goal achievable, it is important to strengthen the regulations, bearing in mind the harm caused by these traffickers and the amount of benefit they have received. This is why it is necessary for the international community to take legal action against traffickers in terms of prosecution and punishment these criminals.⁴⁴

Being the focal point of this study, it has been mentioned that the UN Trafficking Protocol and the COE Trafficking Convention place great emphasis on the prosecution and punishment of the criminals involved in human trafficking.⁴⁵ There are no

⁴⁰ Art 2 of the 1921 International Convention for the Suppression of the Traffic in Women and Children, as amended by the 1947 Protocol.

⁴¹ Slavery Convention, art 6.

⁴² 1949 UN Trafficking Convention, arts 1-3.

⁴³ Art 9.

⁴⁴ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UN 2004) para 262, p 130.

⁴⁵ COE Trafficking Convention, art 27.

particular provisions in the Protocol with regard to the sentencing of criminals. However, as mentioned previously in this chapter, both the UN TOC Convention and the Protocol are studied together; therefore, the provisions of the UN TOC Convention with regard to the prosecution and punishment of criminals are applicable to human trafficking.

The UN TOC Convention requires the member state to pay high attention regarding to appropriate punishment to the criminals, so as to emphasize the seriousness of this crime.⁴⁶ It provides that the States must regard the act of human trafficking as being a serious crime⁴⁷ in terms of the regulations set up by the law enforcement agencies.⁴⁸ Moreover, the UN TOC Convention also makes it binding upon its member states to take legal steps for the release of defendants during the sentencing process and also to ensure that they are present at the subsequent hearing.⁴⁹ Lastly, the Convention provides for the issue of rulings pertaining to time limits,⁵⁰ placing time constraints on bodies involved in legal proceedings. The main aim of this is to reduce time wastage in the trials of criminals and to ensure security and provision of rights to the trafficked victims.⁵¹ It is important to state that activities relating to human trafficking must not be overlooked as they are human rights violations. The criminals must be punished promptly and justice granted to the victims irrespective of how long it takes. This is why the Convention requires States to adopt a longer period of time for prevention of human trafficking.

The provisions of the UN TOC Convention go hand in hand with international legislation. These provisions require the member state to enquire, prosecute and punish the offenders of human trafficking with regard to international human rights, so as to provide safety to the victims of human trafficking. The position of the victims is

⁴⁶ UN TOC Convention, art 11(1).

⁴⁷ UN TOC Convention, art 2(b): “‘Serious crime’ shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty.’

⁴⁸ UN TOC Convention, art 11(2).

⁴⁹ *ibid* art 11(3).

⁵⁰ *ibid* art 11(5). The concern underlying such provision is a balance between fairness to victims and defendants on the one hand, and the interests for swift justice and closure on other hand, which is confirmed by the 1966 ICCPR in its art 14, para 3(c), which includes clauses for trial without undue delays.

⁵¹ UNODC, *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UN 2004) para 266, p 131.

the focus of the next section of this chapter. It is the responsibility of the member state to investigate the crime, having regard to the importance of human rights, and to ensure that human rights violators are punished at any cost. It is important for these investigative procedures to be efficient,⁵² as it is the duty of the States' law enforcement agencies to pay due respects to the rights of the victims of trafficking.⁵³

An increase in the strictness of investigative procedures and court trials are now needed to combat trafficking due to an increase in transnational movement and globalization. It has become easier for offenders to run from the punishment provided by their domestic law and enter another State due to globalization. Due to this, several bilateral treaties have come into existence amongst different States in order to facilitate cooperation with each other and secure the judiciary. As a result, it is aimed that the investigation, trial, and arrest procedures become more effective.⁵⁴ To date, it has been the UN Trafficking Protocol that has played a major role in preventing and combating human trafficking as a crime together with safeguarding and assisting the victims in terms of their basic human rights.⁵⁵ As stated in the UN TOC Convention (articles 18 and 19), such efforts are clear examples of all States providing legal support to one another, assisting in trials and judicial procedures, and supporting agencies to work hand in hand against this crime.⁵⁶ However, it has been averred that investigations must be performed after taking approval for every case, by sidelining

⁵² *Ergi v Turkey* App no 23818/94 (ECHR 28 July 1998) para 82.

⁵³ *Assenov and others v Bulgaria* App no 24760/94 (98 ECHR 28 October 1998) para 102. In contrast, traffickers' rights should not be overlooked during investigating, prosecuting, and trial proceedings [UNCHR, Sixteenth Session, CCPR General Comment No 08: art 9 (Right to Liberty and Security of Persons) (30 June 1982) para 1]. A trafficker has a right to liberty and security, and a fair trial. This illustrates the extent of the work of international criminal law, together with the international law of human rights, in order to achieve criminal justice. See, for example, ECHR, arts 5-6; 1966 ICCPR, arts 9 and 14.

⁵⁴ For example, the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union 2005, the International Criminal Police Organization (Interpol).

⁵⁵ Art 2.

⁵⁶ This is similar to the COE Trafficking Convention, art 5(1). The *Terra Promessa Case* in 2006 is a clear example of legal assistance and joint investigations between States. Polish and Italian police worked together to dismantle a network of human trafficking, especially in men, for the purpose of forced labour from Poland to Italy. Approximately 600 men were recruited in Poland to work in Italy through advertisements in newspapers and on the Internet: UNODC, *Toolkit to Combat Trafficking in Persons* (UNODC 2008) 199.

the international regulations, and ensuring that the integrity of the State is fully retained.⁵⁷

Both the UN Trafficking Protocol and the UN TOC Convention are of huge importance at an international level in terms of enhancing the judicial collaboration among States in order to combat human trafficking and also to investigate the offenders of this global crime. Measures mentioned so far, for instance, have combined investigations and legal assistance to allow States to make use of even better resources and methods in order to combat human trafficking as a crime. Even at a local level, the COE Trafficking Convention emphasizes the importance of instituting mutual coordination among the various State agencies responsible for dealing with human trafficking.⁵⁸ In order to fight human trafficking as a transnational crime, it is important to maintain coordination between different States and establish trust amongst them, as is done between the different legal systems of the EU. It is important that all legal efforts are united at both national and EU levels,⁵⁹ regardless of whether States may lose some part of their authority, or sovereignty, in the process. It is the positive results of such collaboration that lead to effective cooperation among states.⁶⁰

Since trafficking needs to be handled as a transitional crime, it is important for all member states to have mutual understanding in their legal regulations so as to avoid conflicts.⁶¹

Proposals in relation to an international treaty on transnational organized crime were first made at the World Ministerial Conference on Organized Transactional Crime in Naples (Italy) in November 1994. In October 2000, followed by eleven sessions, the Ad Hoc Committee made a decision. The process of the drafting of the Convention along with the Protocol was highly participatory. The Convention of Organized Crime is complemented by three additional treaties, known as Protocols, which deal with the Smuggling of Migrants, Trafficking in Persons, and Trafficking in Firearms. The

⁵⁷ Art 19.

⁵⁸ Art 5(1).

⁵⁹ Conny Rijken, *Trafficking in Persons: Prosecution From a European Perspective* (TMC Asser Press 2003) 270.

⁶⁰ *ibid* 87-89.

⁶¹ *ibid* 248.

Convention came into force on September 2003 and the Trafficking Protocol on December 2003.⁶²

Until 2008, there were 143 parties to the United Nations Convention against Transactional Organized Crime. From those 143 parties, 119 were parties to the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons. Provisions of the Trafficking Protocol indicate that the parties should take action to penalize trafficking, provide protection to victims of trafficking, and offer victims temporary or permanent residence.⁶³

However, a point to consider here is that some level of difficulty is seen when dealing with human trafficking as a transitional crime because of several investigations running in various counties, all at the same time. For the purpose of preventing conflicting investigations and in order to guarantee a systematic coordination among intelligence agencies, Europol itself pointed out human trafficking and migrant smuggling as the two main crime areas. In 2004, it assisted in investigations into the smuggling of migrants which facilitated multiple arrests in member states. A study conducted by Europol identified that criminal organizations have high-level capability to adapt to new routes of trafficking as most frequent transit countries in relation to EU's external borders which include Russia, Turkey, the Balkans, and North Africa. Hence, it is important for Europol to be reformed to expand its remit.⁶⁴ This is necessary because most of the trafficking crimes occur in more than one country, both within and outside the EU.⁶⁵ Interpol works closely with Europol, as the Interpol Specialist Operational Network against Migrant Smuggling aims to enhance the real-time exchange of police data across the world to effectively investigate human trafficking/migrant smuggling.⁶⁶

⁶² Anne T Gallagher, *The International Law of Human Trafficking* (CUP 2010) 76.

⁶³ Lindsey King, 'International Law and Human Trafficking' [2013] Topical Research Digest: Human Rights and Human Trafficking 88.

⁶⁴ Matilde Ventrella, *The Control of People Smuggling and Trafficking in the EU: Experiences from the UK and Italy* (Ashgate 2010 and 2013) 59.

⁶⁵ Heli Askola, *Legal Responses to Trafficking in Women for Sexual Exploitation in the European Union* (Hart 2007) 130.

⁶⁶ Interpol, 'INTERPOL-Europol Forum Outlines Steps against People Smuggling' (2015) <<http://www.interpol.int/News-and-media/News/2015/N2015-162>> accessed 27 October 2015.

Returning to a more international stance, it has been observed that the UN Trafficking Protocol has special interest in not only combating the crime but also safeguarding the victims involved. This is explored in detail in the next section.

4.4 ACTION: PROTECTION OF THE VICTIMS OF HUMAN TRAFFICKING

Naturally, an important requirement of trafficking laws is to guarantee the safety of trafficked victims. In the past, when these laws had not been implemented, it was common practice to see victims punished for having the status of irregular migrants, performing forced labour, or being smuggled into a State. Unfortunately, such victims were abandoned and exiled from the State, for the sake of maintaining the sovereignty of that State,⁶⁷ and did not necessarily receive the protection of their home state. This harsh phenomenon is seen less now, and the victims of trafficking are given greater protection than in previous times. Two methods of ensuring the safety of these victims are the prompt recognition of their victim status, and the penalization of offenders. As there is an innocent victim, there is an offender who deserves to be prosecuted.

Nevertheless, this policy is not applicable in certain legislative frameworks. This is why a clearer understanding of the issue is required as per the guidelines of the COE Trafficking Convention and the UN Trafficking Protocol, over local and international levels.

4.4.1 Victims' Rights in the UN Trafficking Protocol

The efforts of international conventions, particularly international human rights law, gave rise to the idea of victim protection. The 1904 White Slave Traffic Agreement was the first international agreement to formulate this idea openly. The aim of this Agreement was to call for adequate measures to ensure victims' protection from the misuse and coercion created by human trafficking.⁶⁸

⁶⁷ Paul J D'Anieri, *International Politics: Power and Purpose in Global Affairs* (2nd edn, Wadsworth, Cengage Learning 2011) 416.

⁶⁸ Preamble and art 2.

Other instruments such as the globally focused UN Trafficking Convention 1949,⁶⁹ the 2000 Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography (OP/RSCP),⁷⁰ and the regional COE Trafficking Convention⁷¹ all include notions of protection of trafficked victims. Also important to note here is that the protection should be universal, irrespective of the immigrant status (regular or irregular) of the victim.⁷²

The UN Crime Commission a law enforcement body has been responsible for facilitating the drafting of the UN Trafficking Protocol.⁷³ As a result, its greater emphasis is on addressing of the criminal aspect of human trafficking, such as punishing the criminals, rather than the safeguard of the victims involved. Further, the Protocol does not focus on the importance of rehabilitating the victims into better conditions, or on the betterment of the living environment from where the victims are trafficked. This latter issue is more an economic or social issue, rather than a legal issue. Therefore, it is observed that the format of the Protocol can be interpreted in two ways. Under the scope of criminal law, it clearly states: 'Each State Party shall adopt such legislative and other measures'.⁷⁴ On the other hand, under the scope of the protection of victims, it states that 'in appropriate cases and to the extent possible ... each State Party shall protect'.⁷⁵ Consequently, it can be seen that the primary focus shifts from the protection of trafficked victims to criminal legislation of trafficking. While an important purpose of the Protocol is to provide safety and protection to the victims, it is not its only purpose, and is only put into effect in cases where the trafficking has been of a transnational criminal nature.⁷⁶

Article 6 of the UN Trafficking Protocol clearly states that the protection of victims' rights is a vital task. It recommends that the member state maintains the

⁶⁹ Arts 16, 17 and 19.

⁷⁰ Arts 8, 9 and 10.

⁷¹ Arts 10-17.

⁷² Mirko Bagaric and others, *Migration and Refugee Law in Australia: Cases and Commentary* (CUP 2006) 441.

⁷³ Global Rights ('formerly International Human Rights Law Group'), *The Annotated Guide to the Complete UN Trafficking Protocol* (Global Rights 2002) Introduction.

⁷⁴ Art 5.

⁷⁵ Art 6.

⁷⁶ Art 4.

confidentiality of the victim's identity.⁷⁷ This is imperative because disclosing the name of the victims is likely to make them visible to the criminals involved. Also, it motivates the member state to ensure that in particular cases (not mentioned specifically), the victims are made aware of their administrative and legal standing, as well as their rights during legal action.⁷⁸ The same article also discusses the importance of helping in the social, mental, and physical rehabilitation of the victims.⁷⁹ However, the fact remains that the wording of the provision is not authoritative, which leaves the decision to the particular States involved and makes enforceability disputable.⁸⁰ Thus, the primary role falls back in the hands of the NGOs to ensure victim assistance and security.

Actions included in psychological and physical rehabilitation include the provision of appropriate residential facilities,⁸¹ with little or no risk of exile or deportation. It is also necessary to provide help to the victims during every step of the legal process⁸² together with psychological support, health facilities and access to other resources.⁸³ It is suggested that States should be required to provide help to the trafficked victims by way of proceedings formulated by the government like trafficking crime proceeds confiscated.⁸⁴ Also as per the Trafficking Protocol, the victims should be granted education and training opportunities, as well as material assistance,⁸⁵ appropriate to their gender, age, and other characteristics.⁸⁶ All this assistance needs to be given by the State so that all victims are entitled to similar rights in all States, to which they are associated before and after the crime,⁸⁷ thus ensuring their safety within that territory.⁸⁸ Finally, the Protocol states that the victims need to be compensated by

⁷⁷ UN Trafficking Protocol, art 6(1).

⁷⁸ Art 6(2).

⁷⁹ Art 6(3).

⁸⁰ Global Rights (n 73) 17.

⁸¹ Art 6(3)(a).

⁸² Art 6(3)(b).

⁸³ Art 6(3)(c).

⁸⁴ Global Rights (n 73) 19.

⁸⁵ Art 6(3)(d).

⁸⁶ Art 6(4).

⁸⁷ Global Rights (n 73) 19.

⁸⁸ Art 6(5).

providing them with 'blood money'⁸⁹ as compensation for their suffering,⁹⁰ irrespective of whether the problems were ethical or material.⁹¹ This provision enables the acts committed by the criminals to be identified, and the human rights of the victims to be restored.⁹² The idea of 'blood money' essentially involves removing the assets involved in trafficking so as to ensure victims' safety.⁹³ Victims are also to be provided with monetary compensation, social help, or general rehabilitation programs.⁹⁴ However, as said above, the wording of the provision ('possibility of obtaining compensation') is not authoritative and thus limits the authority of the provision. It also limits the rights of the government to confiscate the assets of the traffickers.⁹⁵ Even though the UN Trafficking Protocol initially addressed the need to confiscate the property and assets of the traffickers,⁹⁶ this notion was discarded in the final draft of the Protocol.⁹⁷

The protection of the witnesses of trafficking is also implied in the provisions of the UN TOC Convention and the UN Trafficking Protocol.⁹⁸ The UN TOC Convention aims at safeguarding the witness as well the victim of the crime.⁹⁹ It states that it is the duty of the member state to ensure the safety and protection of all witnesses so that they and their families are not abused, threatened or harmed by the criminal organizations.¹⁰⁰ Witnesses are entitled to confidentiality, which constitutes an important part of their protection.¹⁰¹ However, the researcher believes that this safety and security is limited

⁸⁹ Naomi Roht-Arriaza, 'Punishment, Redress, and Pardon: Theoretical and Psychological Approaches' in Naomi Roth-Arriaza (ed), *Impunity and Human Rights in International Law and Practice* (OUP 1995) 21.

⁹⁰ Art 6(6).

⁹¹ The Committee on the Elimination of Racial Discrimination states the general duty to provide compensation of right to seek just and adequate reparation or satisfaction for any damage suffered: UNCHR, CERD General Recommendation No 26: Article 6 of the Convention, Fifty-Sixth Session (03/24/2000) para 2.

⁹² Dinah Shelton, *Remedies in International Human Rights Law* (2nd edn, OUP 2006) 215.

⁹³ 'The Blood Money' could be through provisions for the confiscation of trafficking assets for the benefit of victims' service - for example, establishment of funds for victim compensation.

⁹⁴ Anna Jonsson, 'Trafficking in the Baltic Sea Region: Supply, Demand, and Organized Crime' in Anna Jonsson (ed), *Human Trafficking and Human Security* (Routledge 2009) 73.

⁹⁵ Global Rights (n 73) 20.

⁹⁶ At the second session of the Ad Hoc Committee, Argentina proposed that this measure should be included in the Trafficking Protocol.

⁹⁷ Ann T Gallagher, 'Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis' (2001) 23(4) Hum Rts Qua 975, 991.

⁹⁸ UN TOC Convention, art 24.

⁹⁹ *ibid* art 24(4).

¹⁰⁰ *ibid* art 24(1).

¹⁰¹ *ibid* art 24(2)(a).

to the duration of the trial. As a result, the witnesses are likely to be harmed, both before and after the trial and after they leave the protection of the law. Thus, modifications are required in the Protocol, so as to ensure that the protection of these victims is long-lasting and sufficient.

When the issue related to the protection of trafficked victims arises during or after the course of the trial, the Protocol makes deals with the immigration agencies. With the help of such agencies, the deportation of victims is prevented and they are permitted to reside in the receiving State on a permanent or temporary basis, as they so wish.¹⁰² Applying 'non-refoulement' Such a procedure would typically permit the victims to reflect upon their circumstances,¹⁰³ and decide what is best for them on their own, without time pressure.¹⁰⁴ This approach is also applied to victims who are vulnerable to inappropriate behaviour by other States.¹⁰⁵ Giving a legal status to irregular migrants is also important to encourage such victims to cooperate effectively with the relevant legislative agencies. An example is the *Lyudmila Dzhygun* case in the UK which involving human trafficking,¹⁰⁶ where the victim was likely to face punishment and persecution when returned to own country,¹⁰⁷ and hence they were provided refuge by the receiving State.¹⁰⁸

It is the responsibility of the member state to safeguard the rights of the trafficked victims and not to treat them harshly. Naturally, after the victims have received protection from the government, they tend to regain confidence. As a result, they are

¹⁰² Art 7(2).

¹⁰³ This procedure has already been applied in some countries such as the Netherlands (three months), Italy (six months), Belgium (45 days) and Germany (four weeks); Aika van der Kleij, 'Provisions for Victims of Trafficking in Bonded Sexual Labour, i.e. Prostitution in Six European Countries' [2003] Bonded Labour in Netherlands 19

<<http://lastradainternational.org/?main=documentation&document=1338>> accessed 16 June 2014.

¹⁰⁴ European Commission, Experts Group, *Report on Reflection Period and Residence Permit for Victims of Trafficking in Human Beings* (EC, 16 April 2004) para 3.

¹⁰⁵ *Bensaid v United Kingdom*, App no 44599/98 (ECHR, 6 February 2001) para 34.

¹⁰⁶ *Secretary of State for the Home Department v Lyudmila Dzhygun* (Immigration Appeals Tribunal) App no. CC-50627-99 (13 April 2000).

¹⁰⁷ The Poppy Project has anecdotal evidence that there is a high possibility of re-trafficking victims when they are returned from the UK. They found that about 20% of the women, whom they have been supporting, are re-trafficked: House of Commons, Joint Committee on Human Rights., *Human Trafficking: Twenty-sixth Report of Session 2005-06: Report, together with formal minutes*, vol I (The Stationery Office 2006) para 178.

¹⁰⁸ Anti-Slavery International, *Report on The Migration-Trafficking Nexus: Combating Trafficking Through the Protection of Migrants' Human Rights* (Anti-Slavery International 2003) 19-20.

able to make better decisions and also assist the authorities to punish the traffickers. Thus, a form of trust is generated between the victim and the State.¹⁰⁹ On the other hand, if the legislation does not contain controls to the allowance of residence, for instance as is the case with the legislation of the KSA, it is important to consider the individual position of the trafficked victim.¹¹⁰ However, here too the wordings of the UN Trafficking Protocol are unclear. For instance, it provides that the States are required to 'consider' the possibility of formulating measures that permit the victims to reside in their territory.¹¹¹

Another point that must not be ignored here is that when the UN Trafficking Protocol was being implemented, the Office of the United Nations High Commissioner for Human Rights (OHCHR) and the Special Rapporteur on violence against women suggested a ban on the prompt deportation of trafficked victims.¹¹² 'States parties must prevent immediate expulsion of a trafficked person'.¹¹³ Nevertheless, the suggestion was discarded from the final draft of the Protocol. This is because States believed that permitting victims to reside in their country would affect the sovereignty of the receiving State, and several irregular migrants who are not trafficked victims would take advantage of this provision.¹¹⁴

A key right of all victims is repatriation. It is essential for the receiving state and the State of Origin to collaborate with one another so that the victims are returned, when they are returned, to their homeland without the fear of reprisal¹¹⁵ or re-trafficking.¹¹⁶ The UN Trafficking Protocol emphasized that the victims are not to be deported back to their country of origin promptly¹¹⁷ unless there is a guarantee that they will not face any further harm.¹¹⁸ Once safety is assured, States may allow the victims to make their

¹⁰⁹ Piotrowicz (n 109) footnote 10, p 269.

¹¹⁰ See further discussion in Chapter 6.

¹¹¹ Art 7(1).

¹¹² UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UNODC 2006) 378-379.

¹¹³ *ibid* 380.

¹¹⁴ *ibid* 380.

¹¹⁵ UN Trafficking Protocol, art 8(1).

¹¹⁶ US Department of Justice, Department of Health and Human Services, *Report on Assessment of US Government Activities to Combat Trafficking in Persons* (June 2004) 22.

¹¹⁷ Art 8(1).

¹¹⁸ Global Rights (n 73) 25.

own decision on return¹¹⁹ under no pressure. The assurance of the victim's safety would require both countries to work closely together, both at a victim support level and at a crime control/law enforcement level. However, yet again the ambiguity of the text affects the provisions and renders its status of little regard.¹²⁰ Accordingly, analysis of the provision shows that it does not provide a strong basis to the idea of repatriation of trafficked victims.¹²¹ Many of the details still have to be filled in, assuming that all countries connected to a particular human trafficking chain agree to implement these provisions. The detail of these provisions may need to be negotiated by the relevant countries *inter se*. Lastly, States are not only required to accept the victims of trafficking but are also asked to provide the right kind of physical, psychological, and social rehabilitation to victims.¹²² This requires substantial financial investment and planning.

States of origin are not allowed to prohibit the entry of victims because that would constitute a human rights violation with respect to their right to voluntary repatriation.¹²³ If the government refuses to take responsibility for the victim, this can result in a victim being held in detention for a long period of time.¹²⁴ Unfortunately, 'statelessness' (which is common in the KSA) is not considered in article 8 of the Protocol. The State is obliged to provide the victim with the necessary documents to re-enter their State of origin; however, this does not always happen in practice.¹²⁵ A suggestion is that such victims should be considered as refugees and should also be given a permanent resident status (a common practice in the UK).¹²⁶ Victims without the necessary paperwork, and declared illegal or irregular in a country can become victimized again, and caught up in the underworld/organized crime world based in that

¹¹⁹ Art 8(2).

¹²⁰ UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UNODC 2006) 388.

¹²¹ Gallagher (n 97) 993.

¹²² Kelly E Hyland, 'Protecting Human Victims of Trafficking: An American Framework' (2001) 16(1) Berkeley Women's LJ 29, 59.

¹²³ UNESCO, Fifty-Fourth Session, 'Economic, Social and Cultural Rights: The Return of Refugees' or Displaced Persons' Property By Paulo Sérgio Pinheiro' (12 June 2002) UN Doc E/CN.4/Sub.2/2002/17, paras 49-51.

¹²⁴ Global Rights (n 73) 26.

¹²⁵ UNODC, *Travaux Préparatoires of the Negotiations for the Elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (UNODC 2006) 388.

¹²⁶ Global Rights (n 73) 26.

state, having no access to legitimate routes of employment and protection. So far this part has discussed the kind of protection and assistance that the victims of trafficking receive, such as actions related to the safeguarding of victims along with their repatriation. Here, a subject of debate is whether or not these victims are punished for the crimes that they are forced to commit during the course of trafficking. It is a well-known fact that victims are stressed and fearful when they reach their destination. They are vulnerable to breaking the law if they engage in irregular work or have gained entry into the country improperly.¹²⁷ In the past, such people have been deported back to their homeland even if their status was that of victim. They would then be under constant threat and fear of torture at the hands of their traffickers, who look to get revenge¹²⁸ by reporting these victims to the law enforcement agencies when the victims are deported back,¹²⁹ or engaging in violence against the victim or persons close to the victim in the country of origin. Moreover, when these victims are sent back to their homeland, they are punished for going through irregular migration channels in the first place with forged paperwork. Collectively, these factors instigate fear in the victims and affect their trust in safety and justice. This stops them from reporting to law enforcement agencies. It is therefore crucial for law enforcement authorities to not punish the victims of human trafficking, even if they admit to working irregularly or having used forged passports,¹³⁰ or having consented to being exploited sexually (under duress), as long as they have been forced into being trafficked.¹³¹ Therefore, the OHCHR has recommended that the victims shall not be held accountable for crimes they commit (under duress), and should be provided with all available assistance and security.¹³² Also, the aforementioned provisions need not be dependent upon the victim being prepared to assist the law enforcement

¹²⁷ Commonwealth Secretariat, *Best Practice: Report of the Expert Group on Strategies for Combating Trafficking of Women and Children* (Human Right Unit 2003) 29.

¹²⁸ Christopher C Joyner, *International Law in the 21st Century: Rules for Global Governance* (Rowman & Littlefield Group INC 2005) note 9, 312.

¹²⁹ COE and Parliamentary Assembly, *Official Report of Debates: Ordinary Session (Second part)*, vol II (COE April 2006) 411.

¹³⁰ United States, Victims of Trafficking and Violence Protection Act 2000 (VTVPA), 102(b)(19).

¹³¹ UNODC, *Toolkit to Combat Trafficking in Persons* (UNODC 2006) 103.

¹³² UNHCR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (20 May 2002) UN Doc E/2002/68/Add.1, Recommended Principle no 7, p 3.

agencies.¹³³ Thus, the researcher concludes that actions being taken against human trafficking must prioritize safeguarding human rights and helping the victims.

Conclusively, it can be said that matters pertaining to the safety of the victims of trafficking and the collection of data relating to it are for the large part in the hands of the discretion of governments as per the guidelines of the UN Trafficking Protocol. As mentioned above, the wording of the Protocol is ambiguous and does not provide for mandatory protection of victims. It is for individual states to put these provisions in place. Where individual states do not put these provisions in place the victims feel unsafe, which makes the punishment of the traffickers difficult. The victims also tend to refrain from complaining to the authorities due to their lack of trust in the authorities.

Other than the provisions pertaining to the protection of victims, there is one special feature upon which every other provision depends. This feature addresses questions such as who the victims are, and in what ways they are to be identified. These questions will be answered later in this chapter.

4.4.2 The UN Trafficking Protocol and the Identification of Trafficked Victims

Undoubtedly, the process of identification of the victim forms the basis of all the measures taken to combat human trafficking and ensuring the protection of victims. The process of identification needs to be put into practice by first ensuring the protection of human rights of the victims, allowing them safety, and attempting to free them from the torture inflicted upon them. Unfortunately, when the identification process goes wrong, these victims also suffer at the hands of the law enforcement authorities. It is therefore vital to identify trafficked victims in the best way possible. An individual charged with breaching immigration laws is not provided with safety and help under the law. Usually they are put in detention, awaiting deportation. However, if such an individual is a victim of trafficking, then he, or she, is entitled to protection and legal assistance. Since such failures in identification are reasonably common, the traffickers tend to use this as a tool of threat in order to discourage victims from

¹³³ *ibid.*

reporting their cases to the law enforcement authorities. This is how human trafficking and smuggling of individuals differ from one another:¹³⁴ firstly, protection and security is to be provided to human trafficking victims only. As a result, any confusion in identification deprives the victims of trafficking from the protection that they deserve. Nonetheless, the UN Trafficking Protocol fails to give clear guidelines on the identification and definition of the victims of trafficking. According to Gallagher, this is an important point to consider and portrays a weakness in the law.¹³⁵ This results leads to the creation of some issues in the identification of the trafficked victims¹³⁶ which is considered a key weakness of the UN Protocol.

It is fair to say that instruments other than the Protocol are needed to address the issue of identification. This includes the UN Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power 1985, which states that any individual who has faced social, mental, physical, and financial difficulty, or basic violation of human rights (whether in a group or personally), due to actions that are considered as criminal actions, are all victims.¹³⁷ Various countries have voted in the favour of this Declaration, including Saudi Arabia and the UK.¹³⁸

Unfortunately, since catering for the needs of these victims is bound to increase the financial burden on the government, these victims are 'conveniently' categorized as smuggled or irregular immigrants by the governments.¹³⁹ As a result, many victims of trafficking end up being treated as prima facie irregular immigrants, or smuggled individuals.

An interesting point to consider here is that the lack of a provision in the Protocol setting out a procedure to recognize the victims of trafficking is not accidental; rather, this issue of identifying victims has been under discussion for a long time. However, since it was believed that providing protection to these victims would create financial

¹³⁴ See further section 3.3.2 in Chapter 3.

¹³⁵ Gallagher (n 97) 1000.

¹³⁶ Samuel V Jones, 'Human Trafficking Victim Identification: Should Consent Matter?' ((2012)) 45(2) Ind L Rev 483, 483-512.

¹³⁷ UNGA, UNGA Res 40/34 (adopted 29 November 1985) para 1.

¹³⁸ Benedetto Conforti, *The Law and Practice of the United Nations* (Martinus Nijhoff Publishers 2005) 793.

¹³⁹ Anne T Gallagher, *The International Law of Human Trafficking* (CUP 2010) 278.

issues for the receiving States, it was considered an easy way out to label them as being smuggled rather than trafficked victims.¹⁴⁰ Therefore, the matter of identifying the victims in an appropriate manner was removed from the Protocol by the Drafting Committee.¹⁴¹

In contrast, the COE Trafficking Convention takes a different approach. The Convention was drafted with consideration of the fact that victims of trafficking deserve a clear identification and protection of their rights which is completely contrary to the UN Trafficking Protocol,¹⁴² particularly if they have agreed to help the law enforcement authorities in this regard.¹⁴³ Accordingly, the COE Trafficking Convention requires the member state to ensure that the process of identification of trafficked victims is carried out by competent staff. For this purpose, it is important for all member states to collaborate with one another and with other groups that conduct victim support programs, so that NGOs, which are an important part of European policy and practice landscape, play their part, and so that law enforcement agencies are trained in methods that promote 'proactive identification'.¹⁴⁴

It is crucial to point out that the process of identification of the victims of trafficking must be a difficult one for the investigating bodies. In 2009, of the estimated 12.3 million individuals (approximately) who were trafficked all around the world, only 49,105 were actually recognized as being victims of trafficking.¹⁴⁵ The task of identification can be intimidating and difficult to analyse, carry out, and understand.¹⁴⁶ Also important to note here is that the task of identification will always be seen as an

¹⁴⁰ *ibid* 280.

¹⁴¹ UNGA, 'Note by the Office of the United Nations High Commissioner for Human Rights, the United Nations Children's Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons' (8 February 2000) UN Doc A/AC.254/27, 2.

¹⁴² COE, *Explanatory Report on COE Trafficking Convention 2009*, para 127.

¹⁴³ UNODC, *Combating Trafficking in Persons: A Handbook for Parliamentarians* (UNODC 2009) 46; House of Commons, *The Trade in Human Beings: Human Trafficking in the UK, Sixth Report of Session 2008-09*, vol II (The Stationery Office 2009) para 2.4, p 154.

¹⁴⁴ Victims should not be expected to identify themselves: US Department of State, *Trafficking in Persons Report* (June 2009) 28.

¹⁴⁵ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2010). Furthermore, 4,166 people were successfully prosecuted for trafficking, and 8.5% of convicted offenders were identified by their victims.

¹⁴⁶ See further the most common difficulties: UNHCR, 'The Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs by Jacqueline Bhabha and Christina Alfiev' (October 2009) UN Doc PPLAS/2009/03, pp 9-10.

ex post facto exercise. Practically speaking, it is a difficult task to confirm trafficking unless the act of exploitation has been committed. In cases of cross-border trafficking, the real intention behind the movement of persons only becomes visible after the exploitation has already taken place. Thus, it is usually not easy to recognize victims of trafficking during this period of latency. Moreover, the difficulty faced is greater for the receiving State than the State of origin. This forces the State to use interim identification practices, as set out in the COE Trafficking Convention.

Contrary to the aforementioned opinions, a review of anti-trafficking steps identifies some key misconceptions that impact negatively on the anti-trafficking work at an international level. For instance, the greater the number of trafficking cases reported from a region, the more likely it is that the global community assumes that the local government of that region does not address this phenomenon sufficiently. However, in reality, the region may be taking the crime seriously, with more victims having trust in the law enforcement community, and coming forward, while there is less trust and less focus being put on this crime in other regions.

The US Department Report 2013 stated that a number of governments lack the necessary resources for identifying the victims of trafficking, and this leaves their situation in a limbo. Moreover, when such victims approach the government for help, they are instead punished as being criminals and not victims.¹⁴⁷ It is also seen that certain agencies believe that only women can be victims of trafficking. Thus, they tend to be unsuccessful at identifying male individuals as victims of forced labour, or other forms of exploitation, in spite of the cruel treatment suffered by them. Immigration officers and labour examiners often fail to identify clear cases of male human trafficking.

Thus, it is crucial to understand what contributes to an individual being trafficked. Are they a victim or a criminal? Practically, this cannot be answered directly and has no definite explanation because while some cases are similar, every case turns on its own facts. However, it cannot be ignored that the status of trafficked persons is often

¹⁴⁷ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2013) 10.

linked to illegal immigration.¹⁴⁸ Therefore, it is important for the responsible authorities to determine the status of victims by comparison with other similar cases. For these reasons, the researcher suggests that the UN Trafficking Protocol should include a proper definition and encourage member states to include provision for the recognition of trafficked victims in their domestic laws, so that all victims are provided with the right to assistance and guidance by the authorities as per the UN Trafficking Protocol.

Conclusively, it can be said that this research has focused on the fact that the authorities need to realize that the recognition of trafficked victims must be effective so that the rights and requirement of all victims are safeguarded. It is the responsibility of the government to formulate and implement practical and systematic identification strategies designed to fit multiple circumstances for trafficked victims.

4.4.3 The COE Trafficking Convention and the Rights of Victims¹⁴⁹

Estimated numbers of human trafficking victims vary across the different regions of the world, however all regions are showing high numbers, to include Europe.¹⁵⁰ All stages of trafficking have been observed in Europe, including origin, movement, and destination. Trafficking is analysed in terms of geographical boundaries, and such analysis gives consideration to the fact that trafficking is a global menace, with recent studies showing that it especially affects Europe.¹⁵¹

¹⁴⁸ Gert Vermeulen, 'International Trafficking in Women and Children' (2001) 72(3) International Review of Penal Law 837, 841-848.

¹⁴⁹ The COE standards, since 1977, on the protection and rights of victims include both binding standards (Conventions) such as: Resolution (77) 27 on the Compensation of Victims of Crime (Adopted by the Committee of Ministers on 28 September 1977); European Convention on Compensation of Victims of Violent Crimes in 1983 (entered into force on 1 February 1988) and non-binding policy guidelines (Recommendations) such as Recommendation R (85)11 on the position of the victim in the framework of criminal law and procedure (Adopted by the Committee of Ministers on 28 June 1985); Recommendation R (87) 21 on assistance to victims and the prevention of victimisation (Adopted by the Committee of Ministers on 17 September 1987); and Recommendation (2006) 8 on assistance to crime victims (Adopted by the Committee of Ministers on 14 June 2006). Some deal specifically with victims; others deal with specific forms of crime and include provisions on victims.

¹⁵⁰ Gillian Wylie and Penny McRedmond, 'Introduction: Human Trafficking in Europe' in Gillian Wylie and Penny McRedmond (eds), *Human Trafficking in Europe: Character, Causes and Consequences* (Palgrave MacMillan 2010) 7.

¹⁵¹ *ibid.*

The focus of the COE Trafficking Convention is to provide appropriate shelter for the victims of trafficking, and to protect their human rights.¹⁵² This is different from the focus of the UN TOC Convention and UN Trafficking Protocol, which focus more on the law enforcement aspect of trafficking.¹⁵³ The COE Trafficking Convention also focuses on the minimal threshold of providing help and guidance for the physical and psychological benefit of the victims.¹⁵⁴ The COE Convention is binding on the UK, as a contracting party, and informs developments in the EU, with which it has a substantial membership overlap. Equally its depth of analysis in this area, and the amount of time devoted to the issue, should inform the discussions on this issue in non-COE countries, to include the KSA. Hence why this Convention is discussed here,¹⁵⁵ not only in terms of its application in the UK, but also as a possible model law for voluntary adoption by the KSA, which is not a member of the COE.

Even though the COE Trafficking Convention's provisions and focus differ from those of the UN Trafficking Protocol, there are several provisions that merit discussion.

The COE Trafficking Convention not only looks to safeguard the victims of trafficking but also addresses the need to address their personal circumstances and to deal with factors that are likely to cause disturbance in their State of origin or destination.¹⁵⁶ The Convention also emphasizes the need to protect child victims by not revealing their personal identity so that they are not subjected to violence.¹⁵⁷ This, combined with the provision of article 8 of the ECHR (which focuses on the moral and physical protection of the victim) result in the overall protection of the trafficked victims. The ECHR is of general application, which means that its rights as well as freedoms are applicable to

¹⁵² Purposes of the CoE Convention, art (1).

¹⁵³ Anna Jonsson and Dominika Borg, 'International Efforts to Combat Human Trafficking' in Frank G Shanty and Patit Paban Mishra (eds), *Organized Crime: From Trafficking to Terrorism*, Vol 1(ABC-CLIO 2008) 393.

¹⁵⁴ Carrie Pemberton Ford, 'Contact Human Trafficking' (2007) 184 World Council of Churches 4.

¹⁵⁵ All the COE conventions aim to efficiently combat specific forms of crimes as well as protect the victims of these crimes. They are: the Convention on the Prevention of Terrorism 2005 (entered into force on 1 December 2009); the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism 2005 (entered into force on 1 December 2009); the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse 2010, CETS No 201 (entered into force on 1 July 2010) and the Convention on Preventing and Combating Violence against Women and Domestic Violence 2011, CETS No 210.

¹⁵⁶ Art 11; COE, Explanatory Report on COE Trafficking Convention, para 138.

¹⁵⁷ Art 11(2); COE, Explanatory Report on COE Trafficking Convention, para 142.

everyone within the jurisdiction of the contracting parties. It covers both civil and political rights, such as the prohibition of slavery and forced labour, the right to respect for private and family life, the right to an effective legal solution, and prohibition of discrimination. The Convention focuses on the need to provide the right kind of social, psychological and physical support to the victims of trafficking.¹⁵⁸ This is surely an important provision as victims generally face severe mental and physical stress. The Convention places emphasis on the application of these provisions, which is different from the wording of the UN Trafficking Protocol.

The COE Trafficking Convention also contains provisions pertaining to the reflection and recovery of victims. This is particularly applicable to those who reside illegally in a State, and to those who live in a State under a temporary residence permit. Thereby the victims receive sufficient time to release themselves from the pressure of their traffickers.¹⁵⁹ It is required that the recovery period of the trafficked victims must be at least 30 days. This time duration allows the victims to access all the important paperwork that is required to continue living legally within the State.¹⁶⁰ However, this provision does not relieve the victim from having to provide the required proof of their status when the court so demands.¹⁶¹ Consequently, they do not have the option to refuse to provide evidence to the authorities when interrogated.¹⁶²

Moreover, the COE Trafficking Convention is sufficiently effective to go further than the provision mentioned above in order to protect the victims from exploitation. It does so by encouraging the distribution of residence permits to the victims.¹⁶³ However, this provision is only applicable if the responsible authorities feel that the residence of victims is necessary for their support, or for further investigative purposes.¹⁶⁴ The advantage of this provision is that it is two-sided. First, it provides assistance to the victims of trafficking and allows them to reside legally in an area without any fear of being deported. Second, it allows the law enforcement agencies to

¹⁵⁸ Art 12; COE, Explanatory Report on COE Trafficking Convention, para 142.

¹⁵⁹ Art 13; COE, Explanatory Report on COE Trafficking Convention, paras 172-173.

¹⁶⁰ COE, Explanatory Report on COE Trafficking Convention, paras 177-178.

¹⁶¹ *ibid* para 176.

¹⁶² *ibid*.

¹⁶³ Art 14; COE, Explanatory Report on COE Trafficking Convention, para 181.

¹⁶⁴ *ibid*.

extract and investigate all the information that they need from the victim for the purpose of arresting and prosecuting the traffickers involved.¹⁶⁵ As a result, trust develops between the victims and the law enforcement agencies and the victims do not refrain from sharing information with them, as they do not fear arrest or prosecution by the authorities in return for their help.

Nevertheless, it must be borne in mind that the grant of a residence permit is only possible if the victims agree to assist the authorities in investigative procedures.¹⁶⁶ Therefore, issues arise when the 'personal situation' of the victims is brought under discussion. This phrase is ambiguous since the COE Trafficking Convention does not provide clarification as to the kinds of personal situations that may exist.¹⁶⁷ Moreover, the Convention does not specify the length of time of the residence permit, whether it is temporary or permanent, or under what circumstances it can be extended or renewed. This leaves the matter in the hands of the member state, which may make any decision it wishes. Accordingly, the researcher emphasizes that extension of the permit and related issues must be properly addressed having regard to the requirements of the trafficked victims.

Furthermore, it is vital to mention that the COE Trafficking Convention follows in the footsteps of the international community in order to provide material and non-material compensation for the losses faced by the victims. It is necessary for the member states to provide legal assistance and support as well as aid to the victims as per the domestic law.¹⁶⁸ However, the researcher suggests that it is unlikely that the victims are fully compensated. Therefore, it is important for the COE Trafficking Convention to make it mandatory for the member states to establish funds to compensate victims.¹⁶⁹ A failing in all these efforts is that the traffickers are not usually caught.¹⁷⁰ EU COE Directive 2004/80/EC contains a provision that compensation is

¹⁶⁵ *ibid.*

¹⁶⁶ Alexandra Amiel, 'Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation' (2006) 12 *Buff Hum Rts L Rev* 5, 48.

¹⁶⁷ *ibid.*

¹⁶⁸ Art 15(2); COE, Explanatory Report on COE Trafficking Convention, para 195.

¹⁶⁹ Art 15(4); COE, Explanatory Report on COE Trafficking Convention, para 198.

¹⁷⁰ Amiel (n 166) 49.

given to victims of crime.¹⁷¹ The COE Trafficking Convention gives their member states freedom to establish their own compensatory systems based on their local regulations and laws.¹⁷²

Furthermore, it is stated in the COE Trafficking Convention that if the victims wish to return to their homeland instead of residence, then it is the responsibility of the member states to ensure the safety of these victims. Safety includes safeguarding their personal life, their families, and their personal identity.¹⁷³ By signing agreements between the State of origin and destination, the Convention also focuses on the safe return of these citizens as well as on ensuring that these victims do not fall victim to the same crime again.¹⁷⁴ An example of international agreement on this matter is that the member states would ensure that the victims have all the documents required to enter and live in their State of origin.¹⁷⁵ This provision has been mentioned previously with regard to statelessness.

To summarize, the COE Trafficking Convention provides for the arrest and prosecution of the traffickers, as well as the compensation and repatriation of the victims of trafficking. It not only criminalizes human trafficking but also focuses on the principle of exploitation involved therein.¹⁷⁶ It tackles the issue of human trafficking from a human rights standpoint and not just as a part of the criminal law. This is clear from the provision that it not only promotes reflection and recovery of the victims but also grants them residence permits based on the willingness of the victims to help the authorities in investigative procedures.¹⁷⁷ Unfortunately, even though the COE Trafficking Convention provides for several human rights issues, it fails to address the

¹⁷¹ EU COE, Council Directive 2004/80/EC of 29 April 2004 Relating to Compensation to Crime Victims [2004] OJ L 261/15.

¹⁷² Amiel (n 166) 49.

¹⁷³ Art 16; COE, Explanatory Report on COE Trafficking Convention, para 202.

¹⁷⁴ Art 16(5-6); COE, Explanatory Report on COE Trafficking Convention, paras 205-206.

¹⁷⁵ Art 16(3-4); COE, Explanatory Report on COE Trafficking Convention, para 204.

¹⁷⁶ Organisation for Security and Co-operation in Europe (OSCE), *Report on the Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Identification-Prevention-Prosecution, Human Trafficking for Labour Exploitation/Forced and Bonded Labour: Prosecution of Offenders, Justice for Victims* (OSCE 2008) 49.

¹⁷⁷ *ibid.*

protection of victims' financial and cultural rights, and also fails to address the need to control the causes of trafficking in the State of origin.¹⁷⁸

The next section discusses the criteria by which an individual is judged a victim of trafficking.

4.4.4 The COE Trafficking Convention and Identification of Trafficked Victims

The primary matter of discussion here is based on the definition of a victim of trafficking. It is dealt with in the COE Trafficking Convention but not in the UN Trafficking Protocol. According to the COE Trafficking Convention, any individual who has been subjected to human trafficking is described as a victim of trafficking.¹⁷⁹ Nevertheless, identification of these victims is *de facto* complex and is time-consuming. This affects the security of the victim. Trafficked individuals are those whose human rights have been violated and who are victims of criminal activity. These two features are significant with respect to certain rights, duties, and liabilities that can be taken from broader aspects of law.¹⁸⁰

The COE Trafficking Convention emphasizes the significance of victim identification in article 10. Its contribution is important in identifying victims of trafficking.¹⁸¹ It requires the member state to provide professional and competently trained staff to combat human trafficking with the help of other agencies. Further, there is a provision that the identity of trafficked children is confirmed and their families found, if it is in the interest of the child.¹⁸² Moreover, the article also states that the victim must not be removed until their identity and status is confirmed. Trafficked victims are often mistaken for migrants as their documentation may be fake or may have been confiscated by the traffickers. As a result, they are at a high risk of human rights violation and also of deportation or punishment.¹⁸³

¹⁷⁸ Amiel (n 166) 54.

¹⁷⁹ Art 4(e).

¹⁸⁰ Gallagher (n 139) 277.

¹⁸¹ UNHCR, 'Recommended Principles and Guidelines on Human Rights and Human Trafficking' (20 May 2002) UN Doc E/2002/68/Add.1, Recommended Principle No 7, 6-7.

¹⁸² Art 10(4); COE, Explanatory Report on COE Trafficking Convention, para 137.

¹⁸³ COE, Explanatory Report on COE Trafficking Convention, para 128.

It must be mentioned here that the identification process is instrumental in several ways. First, it allows for the protection of human rights of the victims because it highlights the State to which the victims belong and in which they are exploited. Second, an effective identification prevents the victims from being wrongly punished for crimes that they have not committed. Finally, as a result of the identification process, States learn to become more responsible and how to deal with issues more effectively. Failing to identify victims effectively has caused the UK Government to be cautious about such measures, as mentioned by the then UK Home Office Minister Paul Goggins in a BBC interview in 2006.¹⁸⁴ This is because people tend to label themselves as victims so that they are permitted to reside for an extended period of time in the UK. According to Ezeilo, there are still several unidentified victims of trafficking as well as those who have been wrongly identified by the law enforcement authorities.¹⁸⁵ This proves the importance of having a better screening process with trained staff members.

It is claimed by some that the process of identification of the victim is a waste of precious time that can be spent on other more important tasks.¹⁸⁶ However, it is important for the responsible authorities¹⁸⁷ to be aware of the status and situation of the victims and all the relevant matters pertaining to them even before the process of identification is started. These include gender, age, personal status, link with the trafficker, and cultural background of the victim.¹⁸⁸ This information is crucial in order to formulate an effective identification process in order to safeguard and assist the victims.

Next, it is vital for the authorities involved in the process to be educated and trained in such a manner that their knowledge is of assistance. This education and training must be done in accordance with the prescribed guidelines, together with the authorities

¹⁸⁴ BBC, 'Plans to Help Trafficking Victims' (*BBC.co.uk*, 6 January 2006)

<<http://news.bbc.co.uk/1/hi/uk/4580746.stm>> accessed 4 August 2014.

¹⁸⁵ UNGA, Sixty-Fourth Session, 'Trafficking in Persons, Especially Women and Children' (12 August 2009) UN Doc A/64/290 para 36. The estimated number of victims who were identified in the EU was just 8,981 in 2008. However, this number increased to 14,650 victims in 2009, though it decreased the following year to 8,548 victims: US Department of State, *Trafficking in Persons Report* (June 2011) 55.

¹⁸⁶ COE, Explanatory Report on COE Trafficking Convention, para 127.

¹⁸⁷ The concerned authorities dealing with human trafficking are police, border authorities, and healthcare and social workers.

¹⁸⁸ UNODC, *Toolkit to Combat Trafficking in Persons* (UNODC 2008) 255-256.

working to act upon 'reasonable grounds to believe that a person has been a victim of trafficking'.¹⁸⁹ For instance, the UK has created competent agencies such as the UKBA in order to generate an initial assessment as to whether a person is a victim or not.¹⁹⁰ This is explored in the next chapter of this study.

Moreover, excellent coordination among the competent agencies responsible for dealing with trafficking is essential. All agencies need to collaborate with one another as well with other organizations such as those protecting children and women, and various NGOs. For example, the UK National Referral Mechanism (NRM) acts as a joint body with the UKBA. Its purpose is to participate in the process of victim identification. The UK has implemented the NRM in relation to the protective obligations of the Convention and the Directive. The competent authorities with respect to NRM include the UK Human Trafficking Centre (for UK and EEA nationals) and the Home Office (for all others). Where a person claims to be a victim of trafficking, the authorities decide whether there are reasonable grounds to believe that the person is a potential victim of trafficking. If there are, the person is given 45 days of temporary admission as a reflective period. Thereafter, he or she is maintained on asylum support.¹⁹¹ Also, the COE Action-Oriented Paper in 2010 reported that formulated 'Swift Action Teams' in collaboration with Europol and Frontex. This team was recruited in third-world countries to help identify victims of trafficking and their fake documents at the airport before they fly.¹⁹²

According to the Group of Experts on Action against Trafficking in Human Beings (GRETA), established under the COE Trafficking Convention, the process of identification needs to be independent of the features that are required to support a criminal case or collaboration with the authorities.¹⁹³ It is necessary to make use of effective operational instruments for proper identification of the victims nationally and

¹⁸⁹ COE Trafficking Convention, art 10(2).

¹⁹⁰ UKBA, 'Enforcement Instructions and Guidance' (Home Office 2009) para 9.4 <<http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/enforcement/>> accessed 10 September 2013.

¹⁹¹ Gina Clayton, *Textbook on Immigration and Asylum Law* (OUP 2014) 398.

¹⁹² EU COE, 'Action-Oriented Paper on Strengthening the EU External Dimension on Action against Trafficking in Human Beings; Towards Global EU Action against Trafficking in Human Beings' (25 February 2010) Doc 6865/10, para III, p 13.

¹⁹³ GRETA, *Second General Report on GRETA's Activities*, (July 2012) para 45.

globally. NGOs and other agencies play a vital role in this regard. Examples of these multi-agency identification courses are seen in Russia, Poland, and Moldova.¹⁹⁴ GRETA suggests that the approach to identification should be different in different cases, with the right kind of assistance from authorities.¹⁹⁵

It must be borne in mind that the process of identification needs to be carried out ethically. The interviews need to be respectful, being careful not to compromise the privacy, principles, safety, and confidentiality of the victims of trafficking.¹⁹⁶ Such respectful behaviour tends to increase trust between the victims and the law enforcement agencies, which produces positive results in the long run.

4.4.5 The COE Trafficking Convention and Scrutiny of its Implementation

The provisions of domestic and international conventions on human trafficking are of no use if their implementation is not strictly monitored. Absence of a formal obligation to account for, monitor, and evaluate the processes of combating human trafficking as well as the problems encountered in carrying out responsive actions, affect the overall functioning of the system, in particular that of the UN Trafficking Protocol's provisions. Recent action taken by the COE Trafficking Convention regarding the efficient implementation of the provisions of member states was the establishment of a local body, independent of other bodies, responsible for reporting, monitoring, and assessing the legal actions of the State in response to human trafficking.¹⁹⁷ Interestingly, this system of monitoring of the COE Trafficking Convention is even more effective than its global equivalent known as the Conference of the 'Paris Declaration', which came into existence using the COE Trafficking Convention and its techniques as a model.¹⁹⁸

¹⁹⁴ Petya Nestorova, 'Trafficking in Europe' (Bringing Human Trafficking Out of the Shadows Conference, Cardiff, November 2012).

¹⁹⁵ GRETA (n 195) para 50.

¹⁹⁶ UNGA, Sixty-Fourth Session, 'Trafficking in Persons, Especially Women and Children' (12 August 2009) UN Doc A/64/290 para 36.

¹⁹⁷ Art 36; COE, Explanatory Report on COE Trafficking Convention, para 354.

¹⁹⁸ The Conference of Parties does not have any authority in respect of the Protocol except insofar as their respective subject matters can be brought within the provisions of the UN TOC Convention itself. In July 2004 the Conference of Parties decided, as a move forward, to extend its monitoring, information exchange, co-operation and other functions to the Protocol (UN, First Session, Conference

There are two monitoring bodies that make up the monitoring system¹⁹⁹ under the COE Trafficking Convention. These include GRETA²⁰⁰ and another more politically inclined Committee of the Parties that is directly connected to the COE's Committee of Ministers.

GRETA is an independent body that is technical in nature and comprises partners from various professions, chosen by the Committee of the Parties. The purpose of this group is to ensure compliance by the member states and with the provisions of the Convention and also to generate reports based on the information collected.²⁰¹ It comprises professionals well educated in human rights, and hence greatly contributes to the assistance and guidance of trafficked victims. Its professional and independent nature²⁰² means that its reports are valuable to the COE in debates among parties regarding the actions required to achieve results.

The Committee of Parties is politically inclined and comprises a delegate from every member state of the COE. Its function is to ensure that the recommendations of GRETA are carried out effectively by the concerned authorities and to ensure that the Convention is successfully implemented.²⁰³ In addition to the Special Rapporteur (a role that currently exists as per the United Nations on Human Rights Committee (UNHRC)), the COE Trafficking Convention requested member states to appoint a National Rapporteur to monitor the implementation of anti-trafficking measures at a national level.²⁰⁴ Also, GRETA may establish a survey system to ensure that member

of Parties to the United Nations Convention on Transnational Organized Crime (23 September 2004) UN Doc CTOC/COP/2004/6, Decision 1/5).

¹⁹⁹ The Convention provides for monitoring in great detail, supplemented by rules of procedure adopted by GRETA in June 2009 - COE, 'Rules of Procedure for Evaluating Implementation of the Council of Europe Convention on Action against Trafficking in Human Being by the Parties' (17 June 2009), THB-GRETA (2009) 3.

²⁰⁰ Art 36.

²⁰¹ COE, Explanatory Report on COE Trafficking Convention, para 59.

²⁰² *ibid* para 357.

²⁰³ *ibid* para 354.

²⁰⁴ Art 29.

states comply with relevant provisions²⁰⁵ or gather information from civil society,²⁰⁶ or go out in the field to collect other information when deemed necessary.²⁰⁷

When it comes to the legal obligations of member states, there is little difference between the COE Trafficking Convention and the UN Trafficking Protocol. In terms of obligations, at the COE level the lack of a strong structure of implementation can be countered by GRETA's work.²⁰⁸ The COE Trafficking Convention has established reporting, evaluation and monitoring models that serve as helpful guidelines for any domestic laws against trafficking. In order to get a better response regarding human trafficking from the member states, a yearly report should be submitted. An organized pattern must be adopted, that is amenable to change, in order to assess and analyse the issues that arise in the fight against human trafficking. Additionally, independent bodies and experts that are concerned with human rights should be encouraged to take part in the monitoring and evaluation mechanisms. As individual viewers, their participation will positively affect the States' efforts towards countering human trafficking. The development of plans and effective measures to ascertain to what extent the State shares responsibility and accountability, towards human trafficking and its related acts of exploitation, will serve as a forward step in the anti-trafficking campaign.

GRETA has experts in human rights along with professionals trained in issues of trafficking and victim protection, and these individuals must be supported with the COE Trafficking Convention so that they may achieve their target.²⁰⁹ Specifically, there are no provisions in the Convention for member states to file reports, or for organizations or individuals to voice complaints regarding breaches of human rights safeguarded by the Convention. Lastly, no individual complaint mechanism has been

²⁰⁵ COE, 'Rules of Procedure for Evaluating Implementation of the Council of Europe Convention on Action against Trafficking in Human Being by the Parties' (17 June 2009), THB-GRETA (2009) 3, r 3, p 3.

²⁰⁶ *ibid* r 7, p 4.

²⁰⁷ *ibid*, r 8, p 4.

²⁰⁸ Gallagher (n 31) 188.

²⁰⁹ Amiel (n 166) 53.

created by the Convention.²¹⁰ These can all be seen to be weaknesses in the COE system.

To rectify this problem, the researcher suggests modifying the UN Trafficking Protocol to include the reporting, supervising and evaluation mechanism provisions, so that human trafficking can be better and more effectively countered. Further opportunity for adding strength to both content and enforcement of the legal framework is provided by linking the COE Conference of the Parties with GRETA. It is the researcher's view that in order to successfully combat human trafficking, it is necessary to develop cooperation between different partnerships. This bond of mutual work must not only remain between multi-state agencies but extend between different civil society members, such as NGOs, individuals, families and communities. The COE Trafficking Convention, under article 35, states the role of civil society in clearer terms. The structure of participation ensures that it will serve as an asset to reporting, evaluation and monitoring functions, and simultaneously allows mutual cooperation between member states in terms of the COE Trafficking Convention. Furthermore, the researcher considers that individual participation in the form of reports of suspicious trafficking activity has become a significant part of the participatory structure.²¹¹ Also, the participation of stakeholders might push the States to adhere to their obligations in the fight against human trafficking.

4.5 VICTIM PROTECTION IN THE EU LEGAL FRAMEWORK

The EU enjoys an extensive legal and policing structure against human trafficking. As an example, the Framework Decision to combat these crimes was taken up by the EU in 2002,²¹² and the Framework Decision to combat the sexual exploitation of children and child pornography was taken up in 2003.²¹³ Lastly, in 2004, the Home Affairs

²¹⁰ *ibid.*

²¹¹ Mohamed Y Mattar, 'Incorporating the Five Basic Elements of a Model Antitrafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14 (2) *Tulane J Intl & Com L* 357, 408.

²¹² EU Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings [2002] OJ L 203/1.

²¹³ , Council Framework Decision 2004/68/JHA of 22 December 2003 on Combating the Sexual Exploitation of Children and Child Pornography (2004) OJ L 13/44.

Council and Justice made a policy of the grant of residence permits to victims who belonged to third-world countries and who offered their cooperation with the authorities.²¹⁴ The Charter of Fundamental Rights of EU prohibits human trafficking as a violation of human rights and distinguishes it from the ECHR.²¹⁵

4.5.1 Legal Protection of Victims in the General Framework

In the past, the EU's put their efforts into suppressing human trafficking as an adjunct to other criminal issues, but lately they have accepted human trafficking as a serious human rights breach.²¹⁶ There were two previous attempts to legislate to combat human trafficking, which were deemed unsuccessful. Therefore, in 2010, a Directive was proposed by the Council of the European Union (COEU) against trafficking, stressing the need to protect the trafficked victim.²¹⁷ Mandatory legal measures have been taken up by the COEU for the protection of trafficked victims. 2001 marked the first step when the COEU took up the EU Decision 2001/220/JHA,²¹⁸ which resulted in the definition of a victim as a natural person who has been harmed physically or emotionally, or economic loss, directly caused by acts that are in violation of the law.²¹⁹ It was made mandatory for the member states to provide the trafficked victims and their families with protection so as to prevent any form of retaliation or re-exploitation.²²⁰ Moreover, victims are afforded the right to receive or give information, and take part in the prosecution while having the right to protection during the legal proceedings.²²¹ Decision 2001/220/JHA requires the member states to adopt the

²¹⁴ Directive 2004/81/EC of 29 April 2004 on the Residence Permit Issued to Third-Country Nationals who are Victims of Trafficking in Human Beings or who have Been the Subject of an Action to Facilitate Illegal Immigration, who Co-operate with the Competent Authorities [2004] OJ L 261/19.

²¹⁵ Jo Goodey, 'Human Trafficking: Sketchy Data and Policy Responses' (2008) 8(4) *Criminology and Criminal Justice* 421, 423; The COE Trafficking Convention, however, said about it that most of the measures aimed at trafficking regarding the treatment of trafficked victims *de facto* are not successful; Amiel (n 166) 56.

²¹⁶ Tom Obokata, 'Trafficking and Smuggling of Human Beings in Europe: Protection of Individual Rights or States' Interests?' (2001) 5 *Web Journal of Current Legal Issues* 5.

²¹⁷ EU COEU, 'Proposal for a Directive of the European Parliament and of the Council on Preventing and Combating Trafficking in Human Beings, and Protecting Victims, Repealing Framework Decision 2002/629/JHA' (29 March 2010) COM(2010) 95 final, point 1.1, p 2.

²¹⁸ EU COE (2001) OJ L 82/1, Article 1(a).

²¹⁹ Art 1(a).

²²⁰ Art 8.

²²¹ Arts 3-5.

required measures to prevent re-victimization and to ensure that victims are not pressurized.²²² This should result in involvement of victim support systems that can organize the trafficked victim's initial reception along with any help or support that they seek.²²³ The fact that victims do not receive protection after the criminal proceeding has finished is the main failing of this Decision.²²⁴

Additionally, in 2004, the Council Directive of 2004/80/EC was adopted by the EU so that trafficked victims who have been trafficked internationally can receive compensation.²²⁵ The Directive states that if an international crime has taken place in a member state of which the applicant is not a resident, then he/she retains the right to apply to an authority or any other concerned body in the state where the crime took place.²²⁶

This provision in the Council Directive attempts to form a system of cooperation among member states so as to ensure compensation for the trafficked victim.²²⁷ This reference in the Directive towards trafficked victims stems from the cross-border nature of trafficking and the fact that this makes any legal action against traffickers difficult because they may remain unidentified or evade prosecution.²²⁸ At times the victims are too afraid to identify their offenders, making it impossible to acquire compensation from the traffickers. As a result, under the spirit of cooperation, it falls upon the member state to provide access to compensation in cases where the trafficking offence has taken place in a member state in which the victim is not resident, which is usually the position in most trafficking cases.

²²² Art 15.

²²³ Art 13.

²²⁴ Obokata (n 39) 100.

²²⁵ EU COE, Council Directive 2004/80/EC of 29 April 2004 Relating to Compensation to Crime Victims [2004] OJ L 261/15.

²²⁶ Art 1.

²²⁷ EU COE, 'Proposal for a Council Directive on Compensation to Crime Victims' (16 October 2002) COM (2002) 562 final, point 1.1, p 2.

²²⁸ Amiel (n 166) 19.

4.5.2 The Issue of Residence Permit to Illegal Entry and Victims of Trafficking

Due to increasing levels of irregular immigration into the EU, the COEU decided to adopt Council Directive 2004/81/CE.²²⁹ According to this Directive, a residence permit can be issued to facilitate irregular immigrants if they have assisted the competent authorities.²³⁰ The increasing ways of gaining illegal entry into the territorial area belonging to the member state have provoked the EU to strengthen their measures against illegal immigration by limiting the duration terms of residence permits granted to trafficked victims. The EU currently is not a party to the Convention, so where a person considers that their rights have been violated by the acts and bodies of EU institutions, the ECtHR has limited capacity and jurisdiction. Consequently, a lacuna has developed in the European framework in terms of the protection of fundamental rights. Once the EU becomes a signatory to the ECHR, this should be rectified, as identified by Treaty of Lisbon.²³¹

A six-month reflection period is provided by the Directive if the victims agree to cooperate with the competent authorities, and this period may be extended if the repatriation may result in their re-victimization or re-exploitation.²³² Moreover, within this time period, the victim shall not be deported, and may receive medical and psychological support, accommodation and translation services.²³³ If the competent authorities decide that keeping the victim in their country will prove useful (such as testifying against the trafficker), a six-month residence permit may be issued.²³⁴ For this to be issued, the victim must have no contact with the trafficker.²³⁵ While it is one

²²⁹ Council Directive 2004/81/EC of 29 April 2004 on the Residence Permit Issued to Third-Country Nationals who are Victims of Trafficking in Human Beings or who have Been the Subject of an Action to Facilitate Illegal Immigration, who Co-operate with the Competent Authorities [2004] OJ L 261/19.

²³⁰ EU COEU, 'Proposal for a Council Directive on the Short-Term Residence Permit Issued to Victims of Action to Facilitate Illegal Immigration or Trafficking in Human Beings who Co-operate with the Competent Authorities' (11 February 2002), COM(2002) 71 final, pp 2-3.

²³¹ Massimo Merlino and Joanna Parkin, 'Fundamental and Human Rights Framework: Protecting Irregular Migrants in the EU' (2015) <http://migration.etuc.org/en/docs_en/3%20Fundamental%20and%20Human%20Rights%20Framework%20Protecting%20Irregular%20Migrants%20in%20the%20EU.pdf> accessed 11 October 2015.

²³² EU (n 230) 2.

²³³ Arts 6-7.

²³⁴ Art 8.

²³⁵ *ibid.*

of the aims of the Council Directive to suppress irregular immigration by getting trafficked victims to assist in the prosecution of traffickers, there remain loopholes through which the trafficked victim may exploit the Directive's provisions in order to elongate their stay within the member state.²³⁶ It is argued by Peers and Rogers that basic rights of victims are not guaranteed, as in the case of unauthorized entry, by the Directive since the legal status of the victim depends on a process over which the victim has no influence. Furthermore, there are no specific provisions in relation to housing or for access to the labour market.²³⁷ On the other hand, protection and support should be given to victims so that they may recover with complete respect of their rights to confidentiality, privacy, self-determination and freedom of movement without being discriminated against based on their race or gender.

Also, the Council Directive can be applied to third-country national victims who have been involved in trafficking between two other states, even if they have entered illegally.²³⁸ It should be borne in mind that, under the Directive, trafficking and irregular immigration are seen as two separate offences.²³⁹ The central component of this part of the Directive is that nationals belonging to other EU member states cannot enjoy this provision since it is aimed at third-country nationals,²⁴⁰ and EU citizens that reside in the EU but have a different country of origin must be deported.

Furthermore, trafficked victims are granted the rights to work, education and vocational training, by the Council Directive, depending upon the time allotted in the residence permit.²⁴¹ This provision is aimed at social reintegration of the victim and faces difficulty due to the limited time period granted by the Directive.²⁴² The residence permit may be taken away from a trafficked victim in the following circumstances: 1) if they maintain relations with their trafficker(s), 2) if they filed a fraudulent or false complaint or are not fully cooperating, 3) if it causes a concern for

²³⁶ Steven Peers and Nicholas Rogers, 'Victims of Trafficking or Smuggling' in Steven Peers and Nicholas Rogers (eds), *EU Immigration and Asylum Law: Text and Commentary* (Martinus Nijhoff 2006) 851.

²³⁷ *ibid* 852.

²³⁸ Art 3.

²³⁹ Conny Rijken, 'Challenges to Criminal Justice Co-operation in Combating Trafficking in Human Beings in the European Union' (2005) 6(2) *ERA-Forum* 267, 274.

²⁴⁰ *ibid*.

²⁴¹ Art 11(1).

²⁴² Piotrowicz (n 109) footnote 10, p 272.

national security or due to reasons related to public policy, 4) if they stop cooperating with the authorities, or 5) if the relevant authorities decide to discontinue the proceedings.²⁴³ It has been pointed out that a victim may not be left with much choice and may be forced to contact his/her trafficker(s) for fear of retaliation against family members. From a legal point of view, the provision is therefore seen as inflexible and ineffective.²⁴⁴

4.6 ASSESSMENT OF THE PROTECTIVE ACTIONS REGARDING VICTIMS' RIGHTS

Even though it is clear that trafficking is a breach of basic human rights, this criminal activity keeps on occurring because governments and the public do not heed it as much as they should.²⁴⁵ It is likely that this is because of the discrepancy in data about the magnitude of the problem, given that most victims choose not to speak about their position or the crime because they fear the risk of deportation or retaliation. Also, the COE and UN, unlike the EU, remain hesitant to take up legally obligatory measures that can significantly safeguard the victims. Consequently, this serves to increase the trafficking problem.²⁴⁶ An important step to eradicate human trafficking is the criminalization and prosecution of traffickers (as per the UN Trafficking Protocol and COE Trafficking Convention). However, the ill treatment that the victims are subjected to while they are being trafficked, or during their participation with the authorities, is still considered to be a major violation of basic human rights.²⁴⁷

The rights a person must have and which should not be violated are further hampered by the issue of permanent residence. This component should be such that every victim is granted permanent residence and should not depend on whether they have decided to cooperate with the authorities. Access to social services should be provided to the victims even if they refuse to take part or help with the prosecution. If the victim is hesitant to return to their home country, they should be offered a place to stay in the country of destination where exploitation occurred. This is particularly in cases where

²⁴³ Art 14.

²⁴⁴ Piotrowicz, (n 109) footnote 10, p 273.

²⁴⁵ OSCE (n 176) 32.

²⁴⁶ Suzanne Egan, 'Protecting the Victims of Trafficking: Problems and Prospects' (2008) 1 Eur Hum Rts L Rev 106-119.

²⁴⁷ *ibid.*

the victim is expected to be exploited again. The important thing to keep in mind is to properly distinguish trafficked victims from illegal migrants to prevent any wrongful deportations. In order to accomplish this, qualified and experienced staff are required to ensure correct identification and to provide adequate protection and assistance to the victims.²⁴⁸ Before deporting a victim, it should be made known to them that they can get assistance in their home country so that they do not become victims once again. This could be accomplished by mutual cooperation between the country of origin and destination.

On the other hand, the suggestion to provide permanent residence status to everyone that appears to be a victim of trafficking can be disadvantageous in two ways: first, it will promote human trafficking, and second, it will allow the smuggled economic migrants to acquire permanent residence by pretending to be victims of trafficking. It is argued by the researcher, however, that this may occur only if the permanent residence proposal were implemented without specific details. According to the researcher, enacting such a proposal must require a serious process that has been backed by a study and analysis on the circumstances of the trafficked victim. Specialists have not taken part in any such study, as will be explained further while looking into UK national efforts to identify the human trafficking victims.²⁴⁹ Prior to granting permanent residence permits, a few parameters need to be considered: first, whether an applicant is deserving of a trafficked victim status, and second, whether providing the victim with permanent residence will result in uncovering real evidence and information, by cooperation with relevant authorities, to prosecute traffickers. Next to consider is the probability of the victim being re-exploited or re-trafficked after returning to their country of origin. Also worth considering is the chance of reprisal after being sent back to their country of origin because of the help they provided to the competent authorities. All of these scenarios must be considered before granting residence to the trafficked victim, so that each case is clarified individually. These procedures will not increase human trafficking, because of the failure to acquire

²⁴⁸ Klara Skrivankova, 'United Kingdom' in Global Alliance Against Traffic in Women (GAATW) (ed), *Collateral Damage: The Impact of Anti-Trafficking Measures on Human Rights Around the World* (GAATW 2007) 21.

²⁴⁹ See further discussion in Chapter 5.

permanent residence permit, but may prevent smuggled economic migrants pretending to be victims of trafficking from gaining the status of victim that do not possess the essential element of trafficking, that is, proven vulnerability to exploitation.

People will claim to be victims of human trafficking when they're not, they'll use it as a way of extending time here ... We've been very clear over recent months and years to differentiate between those people who genuinely seek asylum and those people who come here for other purposes, we don't want to undermine that.²⁵⁰

Another core issue regarding the safeguarding of human rights of victims of trafficking is their illegalization and criminalization. From the human rights perspective, one of the points of focus has been to create opportunities for legal employment and regular migration policies. This step can reduce human trafficking in the EU – particularly if the financial conditions among states are good. Therefore, this may change or at least decrease the likelihood of victims being perceived as criminals and deported.²⁵¹

Also, in cases where certain acts are classified by competent authorities as trafficking, they may fail to note a breach of conventional labour rights, and relevant associations regarding the law of labour rights are often omitted from thought.²⁵² As a result, labour victims of trafficking are considered as illegal workers and as such are not protected by the labour law, which compensates for breach of human rights. Hence, the chance of achieving justice or being compensated is compromised. Consequently, the victim of trafficking is not afforded sufficient protection to ensure their safety and rehabilitation. For protection of trafficked victims to increase, human rights instruments need to be interpreted and applied in such a manner as to guarantee that victims are well protected, and are not left in danger of being re-victimized. It is important for the KSA to establish, interpret and apply human rights instruments in order to be protected and safeguard the rights, as currently the KSA has no international instruments.

²⁵⁰ BBC (n 184).

²⁵¹ Jyoti Sanghera, 'Unpacking the Trafficking Discourse' in Kamala Kempadoo, Jyoti Sanghera and Bandana Pattanaik (eds), *Trafficking and Prostitution Reconsidered: New Perspectives on Migration, Sex Work, and Human Rights* (2nd edn, Paradigm 2012) 9.

²⁵² Skrivankova (n 248) 16.

Thus, it could be said that adopted international instruments and measures might not lead to unity, but rather fragmentation of the international response to criminalization and prevention of human trafficking. However, this is not the case. For a long time, it has been established that human trafficking is a cross-border phenomenon and not restricted to one country. There should be coherence between legal obligations and instruments to protect the victims of trafficking in accordance with the legislation and circumstances of each state. The UK is ahead of the KSA as it has implemented instruments to protect and safeguard victims of trafficking, but it still needs to fill the gaps. The KSA is far behind the UK and must take further steps to combat human trafficking. This does not deny that the process of trafficking cannot or does not occur within the borders of national states. What this means is that cross-border trafficking necessitates mutual cooperation between international states, so that what is considered a crime domestically is also considered a crime internationally. This establishes the importance of regional or bilateral treaties. As an example, it is the aim of the COE Trafficking Convention to unite efforts to abolish the crime of trafficking, moving on from regional to national legislation. It requires an internationally coordinated plan, undertaken via an effective international legal instrument, to address the processes, catalysts, and results of human trafficking.²⁵³ As trafficking is a transnational issue, the role of international law in forming conceptualizations of, and responses to, trafficking in humans is fundamental. The UN-issued international conventions are regarded as a protective cover for all states, and as such, it is necessary for the states to enact these treaties in order to combat this crime on a global scale. As long as different national instruments are established and implemented in the spirit of the prevention of crime, the assistance of victims, and to create cooperation and understanding between states, it will not result in fragmentation regarding the understanding of the issue and the suppression of crime. Therefore, in order to achieve best results, cooperation between judicial and law

²⁵³ International law is necessary to tackle issues, such as human trafficking, which cannot be adequately addressed at the national level. Regional and domestic efforts to address this issue are fundamentally inadequate in isolation by the fact that such directives and decisions bind only a limited number of polities. For example, as regards the EU, the majority of source states are unaffected by the provisions in EU guidelines. Thus EU policy is triggered only once the trafficking act occurs within its borders and the state cannot target the root causes or sources of trafficking: Amiel (n 166) 28.

enforcement agencies is necessary, as is seen at an EU level between Eurojust and Europol or at a global level with Interpol, which are working side by side to increase cooperation between police forces and other relevant authorities in order to prevent and combat human trafficking.

4.7 CONCLUSION

This chapter has discussed two main trafficking instruments: the UN Trafficking Protocol and the COE Trafficking Convention, which together constitute the current legal basis of action against human trafficking crimes. This chapter has aimed at the analysis of the obligations imposed on States to counter human trafficking crimes, and more importantly to safeguard the victims of trafficking. The chapter began with an in-depth description of the relationship between the two instruments and how each one complemented the other. This can be considered as a glimpse of a statement of the reaction of the UN Trafficking Protocol and the COE Trafficking Convention. In addition, it was also a prelude to the perception of human trafficking by European society. Both these instruments were chosen to direct the discussion further on towards the efforts of both the UK, which is a part of the COE Trafficking Convention and the EU legal framework, and the KSA, which is part of the UN Trafficking Protocol. These two countries (that are also the subject of comparative study in this thesis) can be assumed to be local examples of the aforementioned instruments.

Provisions of the UN Trafficking Protocol are given adequate representation in this chapter, although, in the opinion of the researcher, they are not comprehensive and do not contain mandatory language for member states. As a result, discretionary language failed to achieve an effective response, especially concerning the protection of human trafficking victims. Despite that, both instruments concurred on obligations: prevention, prosecution, and protection (the 3 Ps). In terms of prevention and prosecution, both instruments offer almost identical provisions. However, in terms of protection, the COE Trafficking Convention is more focused and requires surveying and evaluation mechanisms to establish the extent of the human trafficking problem and the response and action on the part of the government.

The primary goal of governments is to adopt the best practice(s) to counter human trafficking by adhering to a system of complete and effective anti-trafficking measures. The UN Trafficking Protocol outlining the measures in the current framework is not adequate if used alone, and as such it should add two factors: first, formulation of a network for human rights protection and, second, the merging of monitoring, participation and evaluation mechanisms. Additionally, there are recommendations in the thesis that may improve the '3P' measures so that a far more adept mechanism of intervention can be achieved. In order to suppress human trafficking and protect victims of human trafficking against re-exploitation, additional measures (particularly judicial, policy and administrative measures) need to be adopted.

Second, all forms of human trafficking must be criminalized by the measures undertaken for prosecution, even those offences related to trafficking, which will lead to criminalizing the involvement of all persons involved in human trafficking so that none of the traffickers go unpunished.²⁵⁴ Also, sanctions must be effective and proportionate. Application of effective sanctions on human traffickers, and accomplices, is fundamental to proper enforcement. The measures proposed must ensure that trafficked victims are neither liable nor entirely free from criminal liability for crimes of, and related activities to human trafficking.

Third, effective measures for anti-trafficking become undermined due to lack of an effective, comprehensive and binding legal framework between states so that human rights can be adequately protected. The traffickers are able to evade the law, while the victims have their human rights violated and may still face exploitation due to lack of protection afforded by legislative authorities. This failure in justice can be overcome only by adopting a proper and comprehensive framework for human rights protection. While not easy, enforcement of human rights will occur only through a recognizable mechanism and proper identification of victims.

After analysing the law in this chapter, it can be seen that the legal protection afforded to victims is difficult to enforce against the traffickers. Hence, appropriate measures

²⁵⁴ Constance Gunderson, *Human Trafficking: The Trafficking of Women in Northern Germany for the Purpose of Sexual Exploitation: Systemic Overview of Community Based Responses and Challenges* (LIT Verlag Münster 2012) 68.

need to be undertaken so that identification of victims can be achieved. In order to accomplish this, trained professionals that have worked on trafficking cases previously need to be recruited, so that only those that are identified as victims are afforded protection. As per the discussion on legislation in this chapter, the refusal to assist in prosecution should not allow the victim to obtain a permanent residence permit, and also help should be offered to victims of trafficking so that they may escape influences or perpetrators or traffickers. A sense of personal responsibility is necessary so that victims remain protected and do not have their rights violated further.

This thesis recommends that four criteria must be added to an amended version of the UN Trafficking Protocol that should be ratified by any non-state party. The four criteria are:

- (a) correct definition and proper identification of victims;
- (b) non-criminalization of victims;
- (c) non-discrimination;
- (d) protection and non-refoulement.

In order to reach the required level of human rights protection, the researcher deems necessary an integrated framework together with supervisory and evaluation mechanisms so that proper investigation regarding human rights violation can be carried out.

Even more important is the fact that this approach leads to an effective reporting system, with independent experts in regular national reporting, so that the situation may be assessed and monitored constantly in the combat against human trafficking. This will result in identifying states that might be responsible for crimes of trafficking involving their citizens or within their territories, either as perpetrators or victims. If a state cannot provide a sufficient level of protection to the victims, then it has failed its responsibility as a state that is combating trafficking. It does not matter whether a state has ratified either the UN Trafficking Protocol or COE Trafficking Convention.

There is still much to be done to achieve proper implementation of the 3P approach with special inclination towards human rights protection. In all states there are

powerful criminal justice systems which make sure that proper and fair trials are carried out, which accords with the desire of states to take measures to prevent violation of human rights and provide financial help to further research and development in the field of human trafficking. However, it is argued that a complete and effective plan leading to protection of human rights of victims of trafficking is the approach of choice that will result in the best practice and achieve justice for such victims.

CHAPTER 5: HUMAN TRAFFICKING IN THE UK

5.1 INTRODUCTION

The purpose of this chapter is to analyse the national legislation of the UK with regard to human trafficking and to present a critical analysis of the legislation of the UK based on combating human trafficking, penalizing the criminals involved and protecting the victims. For that reason only certain aspects of the UK human trafficking framework will be focused on.

A thorough analysis of the legislation reveals that while efforts are being made to combat this crime, it continues to expand rapidly in all jurisdictions. It is arguable that this is due not only to the increased awareness of the crime, and therefore a greater focus on it by law enforcement agencies, but also due to deficiencies in the legal framework, particularly in terms of the identification and protection of victims and gender regulation. To this end, the chapter seeks to explain how the provisions of the UN Trafficking Protocol and the COE Trafficking Convention, analysed in Chapter 4 of this thesis, together with the UK's legal obligations under its membership of the EU and the UN are playing a role in how the UK approaches the questions of THB. In principle, the UK is obliged to implement both the UN Trafficking Protocol and the CoE Trafficking Convention into its national law. Hence, it is also of relevance being a member of the EU, UK is bound by the doctrine of supremacy, which provides that EU laws prevail when there is conflict between them and the law of Member States.¹

The Council of Europe Convention on Action against Trafficking in Human Beings entered into force on 1 February 2008. It intends to prevent trafficking in human beings, protect victims of trafficking, prosecute traffickers, and promote co-ordination of national actions and international co-operation. The Council of Europe supports

¹ Horspool, M., & Humphreys, M. (2012). *European Union Law*. Oxford University Press.

governments in the implementation of the Convention and the recommendations emerging from its monitoring process.²

In contrast, the UK is one of 28 member states of the European Union and hence is subject to EU law. European law was incorporated into UK law by the European Communities Act 1972. The most important provisions are set out in sections 2 and 3.

Section 2(1) of the European Communities Act 1972 (ECA) states that:

“All such rights, powers, liabilities, obligations and restrictions from time to time created or arising under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression 'enforceable Community right' and similar expressions shall be read as referring to one to which this subsection applies.”

Section 2(2) provides a general power for further implementation of Community obligations by means of secondary legislation. Furthermore, the section 2(4) of the European Communities Act 1972 states that:

“The provision that may be made under subsection (2) above includes, subject to schedule 2 to this Act, any such provision (of any such extent) as might be made by Act of Parliament, and any enactment passed or to be passed, other than one contained in this part of this Act, shall be construed and have effect subject to the foregoing provisions of this section.”

The section 3(1) of the European Communities Act 1972 states that:

“For the purposes of all legal proceedings any question as to the meaning or effect of any of the Treaties, or as to the validity, meaning or effect of any Community instrument, shall be treated as a question of law (and, if not referred to the European

² COE (adopted 16 May 2005, entered into force 1 February 2008) CETS No 197.

Court, be for determination as such in accordance with the principles laid down by and any relevant decision of the European Court or any court attached thereto).”³

Parliamentary sovereignty is a principle of the UK constitution. It makes Parliament the supreme legal authority in the UK, which can create or end any law. Generally, the courts cannot overrule its legislation and no Parliament can pass laws that future Parliaments cannot change. Parliamentary sovereignty is the most important part of the UK constitution

The effect of section 2 is that European law must be considered to be a valid and binding source of UK law. Where European law exists on a particular subject, it can override any inconsistent UK law, including Acts of Parliament, and in this way, the supremacy of parliament can be compromised.

This chapter also looks at the plight of the trafficked victims, who are deprived of basic human rights as defined by the ECHR. It also provides a detailed analysis of the categorization of the various victims and the resulting laws applicable to them, with special focus on their rehabilitation and recovery.

Moreover, human trafficking is viewed differently when it happens to women, men, and children. This analysis is also provided in this chapter. The chapter also examines in what way the UK Government is said to have an incomplete framework in combating human trafficking. There is special emphasis on the act of forced labour, the main focus of this thesis.

The chapter highlights that the legislation fails to provide a legal basis for dealing with the issue of human trafficking, a crime analysed in detail in chapter 7. The legislation focuses on deporting trafficked victims rather than prosecuting the criminals involved. It is only to be expected, therefore, that the states through their law enforcement agencies are more concerned in maintaining their own sovereignty, rather than protecting victims, an issue best taken up by a political science researcher.

³ The European Communities Act (ECA 1972) <<http://www.legislation.gov.uk/ukpga/1972/68/contents>> accessed 25 Dec 2015

5.2 GENERAL BACKGROUND ON THE UK LEGAL SYSTEM

5.2.1 Legal Relationship between the UK and the EU

The principle of supremacy is a key element in the legal relationship between the EU and the UK legal systems. Lord Justice Laws (LJ) of the UK Supreme Court offered detailed overview about the development of preliminary supremacy and provide numbers of propositions in relation to the advancement of relationship between UK and EU law. It is stated that all the specific rights and obligations developed by EU law are incorporated in UK domestic law due to European Communities Act 1972 (ECA).⁴ The ECA 1972 is a constitutional statute as Laws LJ considers that statutes with heavy constitutional import should be treated differently and should have the ability of repeal by Parliament. The supremacy of EU law has been recognized by the judges of UK as a result of British Act of Parliament.⁵

Under ECA 1972, Parliament gave effect to obligations and duties of UK under former Community and now Union Treaties in national law. Section 2(1) of that Act provides that all provisions of EU law directly applicable, such as EU regulations or provisions of the Treaties themselves. This is in contrast to pre-Lisbon EU framework decisions, one of which previously covered the issue of trafficking in human beings. The new EU directive on human trafficking has a greater legal impact within the UK than the earlier framework decision on human trafficking. Sections 2(4) and 3(1) of the ECA acknowledge that supremacy of EU law, as interpreted by the now named Court of Justice of the European Union (CJEU), post Lisbon Treaty 2009, and formerly known as the European Court of Justice (ECJ). In addition, there is a possibility under both EU and UK law for UK courts to put questions to the CJEU by way of preliminary reference proceedings. The UK courts' acknowledgement of the supremacy of EU law can be understood by the case *R v Secretary of State for Transport, ex parte Factortame*.⁶

⁴ Lisa Webley and Harriet Samuels, *Complete Public Law* (OUP 2012).

⁵ Ibid.

⁶ Christopher Bellamy, *Making Community Law: The Legacy of Advocate General Jacobs at the European Court of Justice* (Edward Elgar Publishing 2008) 103.

The UK is made up of a number of different legal jurisdictions. Jersey, Guernsey and Isle of Man are the self-governing in relation to all matters, excluding international relations and defence for which UK has the responsibility. These are the small island economies which operate on the basis of financial services and tourism. These are not the colonies or part of UK, but have limited international personality. Their relationship with EU is developed in Protocol 3 and the UK's act of association to the EU. Accordingly, they are automatically part of EU for the purpose of custom tariffs as well as free movements of goods only.⁷ They would not, therefore be required under EU law to implement the EU's human trafficking legal provisions.

5.2.2 The EU Legal Frameworks pertaining to Human Trafficking

The EU has taken numerous steps over the past ten years in relation to combating human trafficking with the help of numerous legal instruments. Prior to the adoption of Directive 2011/36/EU,⁸ the EU trafficking legislation comprised three different instruments: the Council Directive 2004/81/EC, the Council Framework Decision 2001/220/JHA of March 2001,⁹ and the Council Framework Decision 2002/629/JHA of July 2002.¹⁰ Although this study is centred on the UK, it is important to appreciate the link between the EU and the UK. Initially, the UK exercised its ability to opt out of the Directive arguing that the UK had already complied with many of the provisions included in the draft EU Directive, and it has a number of opt-out protocols attached to the Lisbon Treaty 2009 with respect to the EU's Area of Freedom Security and Justice, where the human trafficking policy is based. Nevertheless, under domestic political pressure, it later applied to opt in to the Directive, and this was accepted by the European Commission.

The most recent EU legislation on THB is Directive 2011/36/EU. Under this legislation, member states are required to effectively implement regulations, laws and other

⁷ Michael Emerson and Richard Youngs, 'Is the League of Democracies a Bad Idea? How Europe Should Respond' [2008] EPS Policy Brief 1.

⁸ EU [2011] OJ L 1001/1.

⁹ EU COE [2001] OJ L 82/1.

¹⁰ Committee on Civil Liberties, Justice and Home Affairs, 'Trafficking in Human Beings' <http://www.europarl.europa.eu/meetdocs/2009_2014/documents/libe/pv/814/814823/814823en.pdf> accessed 16 November 2015.

administrative provisions to comply with the Directive before 6 April 2013.¹¹ This Directive is considered superior to its predecessor¹² as it is seen to contain a unified and holistic approach to the increasing concern about human trafficking.¹³ As O'Neill argues, the directive has set the definition of THB for the 27 member states to deal with both cross border trafficking and to be used as a framework for individual states.¹⁴ However, she raised the question on how the UK will react to these new Directives internally as the UK does not follow the EU line on policies relating to asylum, immigration and border checks.¹⁵ What is evident is that the approach followed by this Directive inculcates the provisions of the COE Trafficking Convention, the UN Trafficking Protocol, the 2000 EU HR Charter and the ILO.¹⁶ The Directive was issued as a modification of the EU Decision 2002/629/JHA¹⁷ and it sought to expand the previous provisions. As such, member states are expected to choose the new Directive¹⁸ over the original.

Directive 2011/36/EU also introduced the current EU definition of exploitation for human trafficking. Unlike the previous legislation, the new Directive also included begging and exploitation as crimes under THB.¹⁹ This addition was made as a result of the Europol Report that highlighted a significant increase in street crimes, including begging.²⁰ Directive 2011/36/EU goes further to provide a compulsory support mechanism to be offered to trafficked victims.²¹ Scholars argue that expanding the definition of exploitation will significantly affect law enforcement practices in several

¹¹ Art 22; Only 6 member states (Czech Republic, Latvia, Finland, Hungary, Poland and Sweden) out of the 27 EU member states have fully transposed the EU Directive into their national legislation, with the deadline having expired on 6 April: Cecilia Malmström, 'EU States Slow to Respond to Trafficking' (European Commission Conference, Brussels, April 2013) <http://ec.europa.eu/commission_2010-2014/malmstrom/news/archives/2013/04/20130415_en.htm> accessed 5 June 2013.

¹² EU Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings [2002] OJ L 203/1.

¹³ EU [2011] OJ L 1001/1, art 2 para 12.

¹⁴ O'Neill, M. C. (2011). The EU Legal Framework on Trafficking in Human Beings: Where to from here—the UK Perspective. *Journal of Contemporary European Research*, 7(4), 452-467. P453

¹⁵ *ibid*

¹⁶ *ibid* para 7.

¹⁷ EU Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings [2002] OJ L 203/1.

¹⁸ EU Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings (2002) OJ L 30.

¹⁹ Art 2.3.

²⁰ Europol, 'Trafficking in Human Beings in the European Union: A Europol Perspective' (June 2009) 9.

²¹ Art 11, 13, 14 and 16.

areas of criminal activity,²² especially since assistance and support to the trafficked victim are to be provided regardless of the victim's decision regarding cooperation with competent authorities concerning the case or prosecution.²³

Regarding penal policies, the Directive 2011/36/EU sets a minimum sentence of five years for human trafficking;²⁴ which is a departure from the previous position that proposes an 'effective, proportionate and dissuasive' response that could be indictable.²⁵ In more serious cases the sentence may be extended up to a maximum of ten years,²⁶ as compared to the previous limit of eight years.²⁷ A case is likely to be considered serious if: the target of the trafficking is extremely vulnerable or a minor; or if the trafficking has occurred at the hands of a number of criminals having formed an alliance;²⁸ or if the trafficker has put the life of an individual in danger either knowingly or due to their recklessness; or if the trafficking involves an act of aggression or has seriously injured the victim;²⁹ or if the trafficking occurs during the execution of normal duties by government officers.³⁰ Also, extending the Directive has incorporated acts of abetting, and trying to commit trafficking crimes.³¹ These acts are punishable by effective and proportionate penalties as a means of deterrence.³² Sentencing would be pursuant to member states' laws, which must meet the minimum requirements for sentencing in the framework decision. Transnational criminals would be surrendered from one EU member state to another for the purposes of prosecution pursuant to the European Arrest Warrant. Since the Lisbon Treaty of December 2009, Anti-trafficking efforts are seen to have become more effective. This is because the Treaty has moved the third pillar of the EU (clarifying the functioning and direction of the EU), the Police

²² Maria Catherine O'Neill, 'The EU Legal Framework on Trafficking in Human Beings: Where to from here – the UK Perspective' (2011) 7(4) *Journal of Contemporary European Research* 454.

²³ Art 11.3.

²⁴ Art 4.1.

²⁵ EU Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings [2002] OJ L 203/1, art 3.

²⁶ EU [2011] OJ L 1001/1, art 4.2.

²⁷ EU Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings [2002] OJ L 203/1, art 3.1.

²⁸ As defined by the EU Framework Decision 2008/841/JHA of 24 October 2008 on the Fight against Organised Crime [2008] OJ L 300/42, art 1.

²⁹ EU [2011] OJ L 1001/1, art 4.2.

³⁰ *ibid* art 4.3.

³¹ *ibid* art 3.

³² *ibid* art 4.4.

and Judicial Cooperation in Criminal Matters (PJCCM), to the new unitary EU pillar. This has led to the new EU legislation being a directive, rather than another framework decision.

Other aspects that are relevant to Directive 2011/36/EU are questions relating to potential vulnerability and weaknesses of victims. Hence, the Directive included matters of gender, pregnancy, health and well-being when assessing the vulnerability of a victim for the purposes of a stricter punishment,³³ in addition to acts of extreme cruelty such as mental, sexual or physical trauma and torture committed against the trafficked person.³⁴ The Directive obligates member states to take appropriate action such as educating people so as to decrease demand that promotes all forms of exploitation and leads to human trafficking.³⁵ It is also why experts in the field are required to train the frontline police officers.³⁶

The Directive openly specified that financial assistance, essential medical aid and provisions for mental well-being (issues due to gravity, disability, or mental torture or bodily damage), proper and secure housing, and other forms of assistance need to be provided to the targets of human trafficking³⁷ as well as advice and assistance, and translation facilities.³⁸ The UK affirms that this makes certain procedures obligatory that are beneficial for the victim.³⁹ Yet, the researcher argues that a considerable amount of assets need to be collected and preparations made (such as emphasis on standardization of police manoeuvres and changing the rule of administration) so as to assist the victims. Such assistance includes witness protection programmes. This plan is devised by keeping in mind the particular risk assessment and has been separately provided.⁴⁰

³³ EU [2011] OJ L 1001/1, art 2, para 12.

³⁴ *ibid.*

³⁵ Art 18.

³⁶ Art 18.3.

³⁷ Art 11.7.

³⁸ Art 11.5.

³⁹ EU COE, 'Action-Oriented Paper on Strengthening the EU External Dimension on Action against Trafficking in Human Beings; First Implementation Report/Update of Information on Member States' External Action' (4 July 2011) Doc 12401/11, p 112.

⁴⁰ Art 12.

Moreover, a recent issue that was not initially a provision, and has been stipulated in this Directive,⁴¹ is protecting victims who are minors.⁴² If the trafficked individual is of an age that cannot be determined or there is reason to believe that a child has been trafficked, it is to be assumed that he/she is a minor until proof to the contrary is given.⁴³ If minors are included in any investigation, the word 'child' needs to be paid special consideration.⁴⁴ Hence, due to the particular requirements for investigation regarding poor treatment towards a child, the former rules of legislation need to be tempered⁴⁵ along with the selection of a legal guardian, if it is the needed to unaccompanied victims.⁴⁶

After all this time, the Directive still does not make provision for the combined fields of paedophilia, sex tourism or financial legitimization,⁴⁷ and the seizure of items of criminal evidence,⁴⁸ and former rules and regulations continue to be practised. The Directive also highlights legislation dealing with victims of trafficking who have previously been accused of felonies or forced to commit crimes due to the trafficking.⁴⁹

The recent methods used to enhance the process of investigation and prosecution are that EU member states ensure that arraignment can continue until the young victim of trafficking attains maturity.⁵⁰ The amount of time that is required for arraignment depends on the particular country's legislation.⁵¹ This requires the proper training of human trafficking officers and officials who are able to indict traffickers using proper equipment to investigate the cases that are comparable to those involving planned

⁴¹ EU Framework Decision 2002/629/JHA of 19 July 2002 on Combating Trafficking in Human Beings [2002] OJ L 203/1, art 7.1 .

⁴² Arts 13-16.

⁴³ Art 13.2.

⁴⁴ Art 13.1.

⁴⁵ Art 15. These provisions, however, are probably already in place in most, if not all, EU jurisdictions: O'Neill (n14) 456.

⁴⁶ Art 16.

⁴⁷ EU Framework Decision of 26 June 2001 on Money Laundering, the Identification, Tracing, Freezing, Seizing and Confiscation of Instrumentalities and the Proceeds of Crime (2001/500/JHA) [2001] OJ L 182/1.

⁴⁸ Art 7.

⁴⁹ Art 8.

⁵⁰ Art 9.2.

⁵¹ Steve Peers and others (eds), *EU Immigration and Asylum Law (Text and Commentary)* vol 2 (2nd edn, Martinus Nijhoff 2012) 413.

felonies.⁵² The presumption that prevails is that a variety of judicial instruments are present in Europe for carrying out judicial orders in neighbouring countries – for example, forming collective search groups,⁵³ keeping track of bank accounts and additional financial investigations. Targets of trafficking should, where possible, be eligible for compensation if they are the victims of serious crimes.⁵⁴

5.2.3 The Latest EU Legal Framework on the Protection of Trafficked Victims

Directive 2012/29/EU establishes minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA of the European Parliament (EP), and of the Council of 25 October 2012 and the substitution of the Council Framework Decision 2001/220/JHA.⁵⁵ To ensure that victims get adequate support, protection and even compensation, the Directives states that victims have the ‘Right to continue to benefit from protection measures when moving to another Member State’. Although the procedures for this kind of support vary among member states, it was provided that the measure could be either, civil, criminal or administrative in nature. In recognition of the separate legal approach among EU member states, separate instruments were made to ensure that these rights are upheld. These include Directive 2011/99/EU on the European Protection Order (EPO), which instructs that persons who benefit from a protection order in criminal matters issued in one Member State to request a European Protection Order. The second one is Regulation (EU) No. 606/2013 that prescribes on mutual recognition of protection measures in civil matters, allowing for a direct recognition of protection orders issued as a civil law measure between Member States. On compensation for a victim, Directive 2004/80/EC provides that persons can apply for state compensation when they have fallen victims to crime abroad. This type of compensation according to the Directives has to be fair and appropriate. The Commission of the European Communities’ report shows that because there is wide disparity in national laws, the

⁵² Art 9.4.

⁵³ EU Act of 29 May 2000 on Establishing in Accordance with Article 34 of the Treaty on European Union the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (2000/C 197/01) (2000) OJ C197/1, art 13.

⁵⁴ Art 17.

⁵⁵ EU [2012] OJ L 315/57.

aim of harmonizing legislation in the area of victims' rights had not been achieved by the expiry of the time prescribed in the Decision. Moreover, the laws in many areas have been affected by their non-compulsory nature, therefore it was not satisfactory.⁵⁶

Directive 2012/29/EU clarifies that all the rights and privileges of victims of crimes should be protected.⁵⁷ However, certain singular rules have at times been applied to particular victims. This restraint in the application of such rules may be due to many reasons. Firstly, the governance of whether or not a victim is entitled to the privileges stated in the Directive, and whether the victim is only allowed certain privileges and not others, is governed by the domestic law of the region.⁵⁸ Secondly, as stated in article 7 of the Directive, translation services for trafficking victims during trials/hearings should only be provided when the final sentence is passed unless the lack of translation hampers the trial in any way. In addition, a separate legislative measure for the right to interpretation and translation was proposed by the Justice Council. According to this legislative measure, interpretation services should be provided where necessary for the purpose of safeguarding the fairness of the proceedings. This includes services during police questioning, essential meetings between client and lawyer, and all court hearings and any necessary interim hearings. Moreover, remote interpretation via videoconference, telephone, or Internet can be used if the physical presence of the interpreter is not required to safeguard fairness. Written translated documents that are essential for the right of defence should be provided to suspects or the accused who do not understand the language of the proceedings.⁵⁹ Thirdly, according to article 13 of the Directive, the privilege of judicial assistance is restricted to victims who are part of the criminal trials. This means that the privilege is only given by member states when the victim is part of criminal trials as stated by a region's domestic law. Fourthly, only those victims who are a functional

⁵⁶ EU, Commission of the European Communities, 'Report from the Commission: Pursuant to Article 18 of the Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings (2001/220/JHA)' (2009) 166 final (20 April 2009) 9.

⁵⁷ The Trafficking of Victims has also been discussed in Chapter 4.

⁵⁸ Sławomir R Buczman, 'An Overview of the Law Concerning Protection of Victims of Crime in the View of the Adoption of the Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime in the European Union' (2013) 14(2) ERA Forum 235, 245.

⁵⁹ European commission, 'Right of the accused to interpretation and translation' (Justice, 11 June 2015) <http://ec.europa.eu/justice/criminal/criminal-rights/right-translation/index_en.htm> accessed 14 December 2015

part of the crime are liable to pay the costs of a trial, as stated by article 14 of the Directive. This means that member states are only obliged to pay essential costs of the victim's involvement in the trial minus victims' legal costs. Moreover, claims for repayment, typical living expenses, travel expenses and replacement of lost wages may be stated in the domestic law by the member state.⁶⁰ Finally, as per articles 22–24 of the Directive, victims of crime that has taken place under certain specific conditions and specific kinds of crime will qualify for a special nature of protection and treatment.

Directive 2012/29/EU is reasonably effective and beneficial overall, even though it has certain restrictions when subjecting victims to certain laws. When contrasted with Framework Decision 2001/220/JHA, there is no doubt that the Directive 2012/29/EU is better able to support the rights of trafficked humans throughout the EU. This is because it accounts for more rights and privileges than those already-existing criteria or demands new criteria so as to provide support to the victims as follows:

- I. Directive 2012/29/EU applies to members of the victim's family and defines them.⁶¹ This inclusion affects the family where the victim dies as a result of events that took place because of human trafficking and the family has experienced damage thereby. Yet, the Decision 2001/220/JHA is restricted to victims of human trafficking only.⁶² However the legislation grants rights to the family if the victim remains alive. Nonetheless, the Directive 2012/29/EU includes a broader range of rights; for example, the right to security, and the privileges of amenities granted for the assistance of the victim, as well as the right to terminate any means of interaction with the felon as well as the right to safeguard confidentiality.
- II. As far as the victim's right to communication is concerned, Directive 2012/29/EU clearly obliges the involved officials to communicate to the victim in plain language (keeping in mind the victim's situation and disability which may cause him/her to misinterpret terms during the course of the trial) and the right to bring a person who can help them to the court.⁶³

⁶⁰ EU [2012] OJ L315/57, recital 47 of the Preamble.

⁶¹ Art 2.1(a) and 2.1(b).

⁶² EU COE [2001] OJ L 82/1, Art 1(a).

⁶³ Art 3.

- III. Directive 2012/29/EU sets out standard rights to help the victims, along with their family members, from support groups prior to, during and after the trial.⁶⁴ The Directive enumerates the privileges that the targets of human trafficking are to be given including: mental and emotional assistance; details about the country's compensation system; guidance regarding monetary and working problems that may be caused due to the crime as well as guidance concerning the dangers and anticipation of subsequent vulnerability to human trafficking, or crimes of similar nature.⁶⁵
- IV. Even though the provision of security to the targets of human trafficking is mentioned in Decision 2001/220/JHA, it has been described extensively and repeats the ways of providing security already set out in various directives such as Directive 2011/36/EU.⁶⁶ This Directive encompasses various privileges that are intended for the targets of human trafficking and those that are restricted to particularly vulnerable targets such as children.⁶⁷ Hence, Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime attaches importance to such clauses and utilizes creative ways to secure confidentiality, the right of protection from bodily harm, termination of all means of interaction with the criminal),⁶⁸ stages of trial of the felon (investigation and hearings),⁶⁹ and special requirements of the victim.⁷⁰
- V. An essential matter that should be considered while repairing the harm done to trafficking victims and to prevent further damage to him/her by providing restorative judicial facilities. This methodology raises the argument that victims should face the criminals who have committed the crime along with any intermediaries and to ask for the reason for their trafficking, and to demand the felons to admit their wrongdoings and make necessary provisions to help

⁶⁴ Art 8.

⁶⁵ Art 9.

⁶⁶ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA OJ 2011 L101/1.

⁶⁷ Buczma (n 558) 247.

⁶⁸ Art 22.

⁶⁹ Art 23.

⁷⁰ Art 24.

victims recover from the difficulties, discomfort and harm that has been incurred due to them.⁷¹ Directive 2012/29/EU establishing minimum standards on the rights support and protection of victims of crime contains new provisions in order to allow the victim to recover by fair judicial means.⁷²

- VI. Under article 11 of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime a trafficked victim has the right to contest a decision not to prosecute. While there are some exceptions to this rule, as is evident from subparagraph 4 of the article,⁷³ it is nonetheless one of the rules of prime importance. This right of objection to the decision of investigative authorities makes them subject to judicial review. This, in turn, gives a trafficked victim control over the appropriateness of the decision rendered and the level of efficiency shown by investigative authorities during criminal proceedings.

Another significant point mentioned earlier in this chapter is the importance of the training of professionals involved in dealing with victims of trafficking. This can be seen as a tool to reinforce the rights of trafficked victims and has been considered one of the most significant achievements of Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime. In order to accomplish this, officials who are likely to deal with trafficked victims directly or work for victim support services need to be appropriately trained. This enables officials to identify victims of trafficking and their needs more readily and cooperate with them in a professional, respectful, sensitive, and a non-discriminatory manner.⁷⁴

Directive 2012/29/EU set out minimum standards on the rights, support, and protection of victims of crime and establish minimum standards in relation to the rights, support, and protection of victims of crime. The EU has adopted several EU legal instruments setting up common rules aimed at protecting and assisting victims of crime: horizontal instruments dealing with victims' rights in general, more specific

⁷¹ Andrew Karmen, *Crime Victims: An Introduction to Victimology* (8th edn, Cengage Learning 2012) 423.

⁷² Art 12.

⁷³ It is stated: 'Where the decision not to prosecute is taken by the highest prosecuting authority against whose decision no review may be carried out under national law, the review may be carried out by the same authority.'

⁷⁴ EU [2012] OJ L315/57, recital 61 of the Preamble.

instruments on protection measures and financial compensation to victims of crime, and substantive law instruments regarding trafficking in human beings.⁷⁵ The improved standard in dealing with trafficked victims, in turn, improves other countries' perception of the EU. Informing the victims of their rights and about their case gives them the incentive to take part in the proceedings.⁷⁶ Furthermore, the right of victims to be compensated financially provides the victim with satisfaction and knowledge that justice has been served, even if they live far away from where the trial is being held.⁷⁷

Human trafficking is seen in the UK as both a domestic UK crime and to a greater extent, a transnational crime, involving the movement of criminals, their victims, and the proceeds of the crime across national borders. The European Police Agency (Europol) also emphasised the idea of using advance technology and telecom as a means of combating THB across different borders.⁷⁸ This they argue, would help in breaking the links of trafficking networks, and establish cooperation among countries that are not directly involved in the crime, as well as collaborating in terms of banking matters and tax liabilities. Europol, which also networks the various law enforcement institutions across the EU and other countries, alongside the Eurojust, which is a network of investigating and prosecuting magistrates of the EU member states, have been established to deepen operational cooperation among EU member states. Europol is a criminal intelligence agency that aims to analyse the data offered by national authorities and develop risk assessment reports on the crime areas of common concern. The Lisbon Treaty developed the possibility to establish the European Public Prosecutor's Office from Eurojust (article 86 TFEU). It is important to state that this development would not affect the UK, but it will have impact on most EU member states.

The work of Europol is aligned to the EU's Anti-Fraud Office (OLAF). It also has full legal capacity in every EU member state and can sue and be sued for both civil and criminal law issues. Nevertheless, it would not be wrong to state that the work of

⁷⁵ Establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ 2 315/01

⁷⁶ See further discussion in Chapter 4.

⁷⁷ Buczman (n 558) 248.

⁷⁸ Currently operating on the basis of Council Decision 209/371/JHA of 6 April 1999 establishing the European Police Office (Europol), OJ L 121, 15/05/2009 p. 37

Europol has been successful in the past, especially in the operational field among member states. Consequently, trafficking networks have been identified and successfully dealt with. In spite of the fact that Europol has no executive powers of its own, and cannot arrest and detain individuals, and relies on member state law enforcement authorities to undertake the active policing, it works very effectively in exchanging information and collaborating with different law agencies to ensure that the investigations are effective in combating human trafficking.

5.2.4 Legal System of the UK

The UK, however, is not a single legal system as it was developed as a political union from previously independent countries. Currently, the UK has three legal systems and each has its own court system, policing structure, as well as legal professions.⁷⁹ These are the now unified legal system of England and Wales (E&W) (as these two counties merged much earlier), and the two other legal systems of Scotland and Northern Ireland (being what remained in the UK after the independence of the Republic of Ireland). However, the picture is complicated by the fact that some matters are dealt with at a UK level, being reserved matters to be dealt with by the Westminster Government, such as asylum and immigration matters, while other aspects of the legal systems, to include human trafficking, and other related matters, such as policing, are dealt with at the devolved government levels of Holyrood, Scotland, or Stormont, Northern Ireland, level. For example criminal law and certain aspects of employment law are devolved matters being dealt with at the sub-national level. In addition, the legal system in England & Wales and Northern Ireland (NI) are based on the principles of common law. On the other hand, the legal system of Scotland is the combination of both common and civil law traditions, having had a different history prior to its incorporation into the UK. In the UK, there is no written constitution, with the constitution consisting of a number of disparate written sources with statutes, judge-made case law and international treaties, with no technical difference between ordinary statutes and constitutional law. The UK is a dualist legal system, requiring international law to be implemented into domestic law before it can operate in the

⁷⁹ The Legal System of the United Kingdom <<http://www.cilex.org.uk/>> accessed 14 December 2015

domestic jurisdiction. This however does not apply to EU law, which applies automatically under the ECA, as discussed earlier in this chapter. Secondary legislation is comprised of statutory instruments, most common Orders in Council, regulations and rules issued by the parliament. The Queen, though Head of State, unlike in the KSA, has little power, with her role to formally sign into law any Acts of Parliament approved by the two Houses of Parliament.⁸⁰ She usually acts on the instructions of the Prime Minister.

In addition to the sub-national parliaments in Holyrood, Scotland, (which has the greatest power of the three UK sub-national parliaments) and Stormont, Northern Ireland (which is still dealing with the consequences of years of conflict), the National Assembly for Wales, set up in 1998, has growing powers to legislate, with an increasing body of distinctly Welsh legislation developing, leading to the start of the devolution of its jurisdiction from Westminster.⁸¹

5.3 Human Trafficking and Related Legislation in the UK

While the legislation in England & Wales dealing with human trafficking is the same, the Welsh Assembly has been developing separate policies in this area, to include the appointment of the Welsh Government's anti-trafficking coordinator in 2011. In addition the Northern Ireland Assembly has been developing its own policies and laws in the area of human trafficking, as has Scotland. The Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 stated that it a crime of human trafficking where a person arranges or facilitates the travel of another person considered as exploitation by the person being trafficked. Such arranged travel could be through recruitment, transporting or harbouring.⁸² This provision is similar to what is also contained in the Modern Slavery Act 2015 (most of which is applicable in England and Wales only, although some provisions apply for the whole of the UK). According to this Act, a person commits a human trafficking offence

⁸⁰ Tony Porter and Veronica Rubio Vega, Global Forum on Transparency and Exchange of Information for Tax Purposes, *Handbook of Innovations in Transnational Governance: Institutions and Innovations* (Policy Press 2011).

⁸¹ David Feldman, *English Public Law* (OUP 2009).

⁸² Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

if he/she arranges the travel of another person in terms of recruiting, harbouring, or transferring.⁸³ The Human Trafficking and Exploitation (Scotland) Act 2015⁸⁴ also defines human trafficking in the same way as the Modern Slavery Act 2015 and the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

The Human Trafficking and Exploitation (Scotland) Act 2015 has somewhat different approach, as it separates human trafficking from slavery, servitude, and forced or compulsory labour. While section 1 of this legislation states that human trafficking occurs if a person recruits, transports, harbours, receives, exchanges or transfers control over other person with a view to other person being exploited, or arranges or facilitates any of these actions, section 4 refers explicitly to slavery, servitude, and forced or compulsory labour. Under section 4, a person commits an offence of slavery, servitude and forced or compulsory labour if such a person deliberately and knowingly holds another in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is so held; or where a person deliberately forces another person to perform compulsory labour.⁸⁵ Section 3 (Exploitation for purposes of the offence of human trafficking) of the Human Trafficking and Exploitation (Scotland) Act 2015 includes several offences under human trafficking including slavery, servitude, and forced or compulsory labour, prostitution and sexual exploitation, removal of organs, and securing services and benefits. Section 3(1) states that a person is a victim of slavery, servitude, and forced or compulsory labour if it involves the commission of an offence under section 4 or which would constitute such an offence were it done in Scotland. This idea behind this statutory design was to create a single offence of human trafficking for all types of exploitation for both adults and children, consolidating existing criminal law, and to encourage the use of trafficking and exploitation prevention orders to disrupt and prevent trafficking.⁸⁶

⁸³ Modern Slavery Act 2015.

⁸⁴ Human Trafficking and Exploitation Act (Scotland) 2015.

⁸⁵ *ibid*

⁸⁶ Human Trafficking and Exploitation Act (Scotland) 2015.

Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, section 2 states that a person commits the offence of human trafficking if he arranges or facilitates the travel of another person with a view to that other person being exploited by recruiting, transporting or transferring, harbouring or receiving, or transferring or exchanging control. Slavery, servitude and forced or compulsory labour is not addressed under the human trafficking section in this Act.⁸⁷ Section 1 of this Act addresses slavery, servitude, and forced or compulsory labour. According to this section, a person commits an offence if he holds another person in slavery or servitude and the circumstances are such that he knows or ought to know that the person is held in slavery or servitude, or the person requires another person to perform forced or compulsory labour and the circumstances are such that he knows or ought to know that the person is being required to perform forced or compulsory labour. It shows that simply holding a person in circumstances where that person would be required to perform forced or compulsory labour does not count as human trafficking. However, if someone is arranging, facilitating the travel of, recruiting, transporting, transferring, harbouring or receiving another person with a view to exploitation including forced or compulsory labour, that would be considered as an offence of human trafficking.

Similarly, the Modern Slavery Act 2015, human trafficking and slavery, servitude and compulsory or forced labour are addressed in separate sections. Section 2 of the Modern Slavery Act states that a person commits an offence if the person arranges or facilitates the travel of another person with a view to that person being exploited. Furthermore, if the person arranges or facilitates the travel of another person with a view to that other person being exploited by recruiting, transporting or transferring, harbouring or receiving, or transferring or exchanging control, the person so doing would commit the offence of human trafficking.

Here, 'travel' is considered to be a basic element of trafficking. Section 1 of the Modern Slavery Act 2015 addresses slavery, servitude, and forced or compulsory labour. According to this section, a person commits an offence if—

⁸⁷ Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015.

“(a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is held in slavery or servitude, or

(b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform forced or compulsory labour.”⁸⁸

Under this section, forced or compulsory labour is an offence where a person is held in circumstances of slavery or servitude and required to perform forced or compulsory labour. However, if a person is transported, transferred or harboured, with a view to being exploited (like slavery, servitude, or forced or compulsory labour), that would be considered as an offence of human trafficking. Therefore, human trafficking is separate from slavery, servitude, and forced or compulsory labour in the Human Trafficking and Exploitation (Scotland) Act 2015, the Human Trafficking and Exploitation (Northern Ireland) Act 2015, and the Modern Slavery Act 2015 because travel, transfer or transport of a person with view to exploitation is a required element of human trafficking, while, slavery, servitude, and forced or compulsory labour is the ‘exploitation’ by which a person is transferred or transported for human trafficking. Under the Modern Slavery Act 2015 and the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, a person guilty of human trafficking or only slavery, servitude, and forced or compulsory labour is liable on conviction on indictment, to imprisonment for life.⁸⁹ However, under the Human Trafficking and Exploitation (Scotland) Act 2015, a person guilty of these offences is liable, on conviction on indictment, to imprisonment for life or fine, or both.⁹⁰

Sections 1 and 2 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (NI) 2015 provides a notion that the convicted person of a human trafficking offence (18 years of age or above) is punishable by a custodial

⁸⁸ Modern Slavery Act 2015.

⁸⁹ The Modern Slavery Act, s 5(1); Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, ss 1(6) and 2(9).

⁹⁰ Human Trafficking and Exploitation (Scotland) Act 2015, s 4(5).

sentence of at least two years. In addition, it is the duty of the public authority to notify the National Crime Agency where a person becomes the victim of an offence under sections 1 or 2.⁹¹ The National Crime Agency leads the UK law enforcement fight to cut serious and organized crime and was created pursuant to section 1 of the Crime and Courts Act 2013, which came into force in 2013. It replaces the UK wide Serious and Organised Crime Agency, which was also active in the area of Human Trafficking. The Act covers slavery and human trafficking and other exploitation offences including forced labour. Section 17 of the Act (Part 3) states that it is important to ensure whether a person is or is not a victim of trafficking through completion of the identification process set out in article 10 of the Trafficking Convention. Section 18 of the Act provides an overview of the required assistance and support to human trafficking victims. Under this section, the department, which is the competent authority, should be provided with assistance and support, including feasible and safe accommodation, material assistance, healthcare assistance, interpretation services, assistance in relation to legal advice, and assistance with repatriation.⁹²

Pursuant to sections 1 and 2 of the Modern Slavery Act 2015, a convicted trafficker is liable to imprisonment for life, and on summary conviction to imprisonment for a period not exceeding 12 months and a fine. Moreover, under section 4 a person found guilty of a human trafficking offence is liable to imprisonment for a period not exceeding 10 years and on summary conviction for a period not exceeding 12 months and a fine. Sentencing powers in relation to 63G are pursuant to section 1 of the Modern Slavery Act 2015. The amendments made in this Act include the Transparency in Supply Chains provision, a UK wide provision that forces companies to report on the initiatives taken to address slavery in supply chains.⁹³ However, the Act has some limitations; in contrast to the European Trafficking Convention, the Act provides no guarantee on the victim's access to compensation. In addition, the EU Trafficking Directive requires legal assistance to be provided to the victims, but the Modern Slavery Act 2015 stipulates no such requirement. Legal services and advice is

⁹¹ Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 <<http://www.legislation.gov.uk/nia/2015/2/enacted>> accessed 21 June 2015.

⁹² Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 <<http://www.legislation.gov.uk/nia/2015/2/enacted>> accessed 21 June 2015.

⁹³ Modern Slavery Act 2015, s 10.

addressed under the Legal Services Act 2007 for England and Wales, which makes provision for: the establishment of the Legal Services Board and its functions; the regulation of persons who carry on certain legal activities; the establishment of the Office for Legal Complaints and for a scheme to consider and determine legal complaints; claims management services and about immigration advice and immigration services; legal representation to be provided free of charge; the application of the Legal Profession and Legal Aid (Scotland) Act 2007; the Scottish legal services ombudsman; and for connected purposes.

The Scottish legal system is independent from Westminster. Under section 9 of the Human Trafficking and Exploitation (Scotland) Act 2015, support and assistance must be provided to the victims of human trafficking. Under this Act the Scottish Ministers must provide support and assistance to the adult during the relevant period. The period can be the starting date of determining reasonable grounds to accept that the adult is a victim of an offence. In addition, it can be the end of the period set out in regulations developed by Scottish Ministers or the date on which it is determined that adult is not a victim of a human trafficking offence. The support and assistance must include accommodation, health care, legal advice, counselling, repatriation, and interpretation.⁹⁴

5.4 ANALYSIS OF HUMAN TRAFFICKING IN THE UK

Until 2005, no particular policy pertaining to the issue of human trafficking existed in the UK. Even though attempts were made to provide protection, most of the measures appeared to be temporary.⁹⁵ Of particular relevance to forced labour, the Gangmasters Licensing Authority (GLA) was set up under the Gangmasters Licensing Act 2004 which aims to protect exploited workers across the UK. With expiration of the Seasonal Agricultural Workers Scheme (SAWS) and the Agricultural Wages Board (AWB), the GLA became the main source of protection for not only local, but also migrant

⁹⁴ Human Trafficking and Exploitation Act (Scotland) 2015.

⁹⁵ Klara Skrivankova, 'Translating Policy into Action to Support People who have been Trafficked' (Bringing Human Trafficking Out of the Conference, Cardiff, November 2012).

agricultural workers in the UK in the context of human trafficking.⁹⁶ It covers potential forced labour in agricultural work, gathering shellfish, and processing or packaging.⁹⁷ It is arguable that it should also cover other areas of work which could be subject to forced labour.

Recently, the recognition of rights of victims of crime and human rights abuses has been made at both international and supranational levels.⁹⁸ In turn, the UK domestic response is also seen via government initiatives such as the introduction of the Statutory Code of Practice for Victims of Crime of 2013.⁹⁹ This is in addition to earlier frameworks such as the NRM which was introduced in 2009 to ensure that victims receive support. It was also an initiative to meet the obligations of the UK under the Council of European Convention on Action against Trafficking in Human Beings. From 31 July 2015, the NRM has been extended to all victims of modern slavery in England and Wales (followed by the Modern Slavery Act 2015's implementation). From 31 July 2015, the Competent Authority (CA) will decide whether the person is a victim of human trafficking or not. If a person is not found to be a victim of human trafficking, the CA will investigate whether he or she is the victim of another type of modern slavery (e.g. slavery, servitude, or forced labour). The NRM provides a minimum 45-day reflection and recovery period to victims of human trafficking/modern slavery. The CAs now include the UK Human Trafficking Centre (UKHTC), which originally began as an independent organisation and later merged with the Serious Organised Crime Agency. They deal with the referrals from police, local authorities and NGOs.

Moreover, the COE Trafficking Convention 2005¹⁰⁰ includes stronger provisions as well as obligations in relation to victim protection than the UN Trafficking Protocol 2000.¹⁰¹

⁹⁶ Cathryn Costello and Mark Freedland, *Migrants at Work: Immigration and Vulnerability in Labour Law* (OUP 2014).

⁹⁷ Gangmasters (Licensing) Act 2004, s 3(1).

⁹⁸ For instance, the international framework created by the 2000 United Nations Palermo Convention, the Council of Europe Convention on Action Against Trafficking in Human Beings of 2005, and Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims.

⁹⁹ Code of Practice for Victims of Crime Presented to parliament pursuant to section 33 of the Domestic Violence, Crime and Victims Act 2004 <https://www.cps.gov.uk/publications/docs/victims_code_2013.pdf> accessed 25 June 2015.

¹⁰⁰ Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings* (16 May 2005, CETS 197) <<http://www.refworld.org/docid/43fded544.html>> accessed 23 June 2015.

¹⁰¹ Jessica Elliott, *The Role of Consent in Human Trafficking* (Routledge 2014).

Upon witnessing the fate of the victims of trafficking, the UK Government has made a number of changes to its human trafficking provisions. Part of the changes contained in the Modern Slavery Act of 2015, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (NI) 2015 and the Human Trafficking and Exploitation (Scotland) Act 2015 include a new trafficking prevention order and measures on supporting victims (such as the provision of a statutory defence). The current framework gives a broader definition of slavery than used in earlier legislation. Essentially, it now can include victims that have been brought from overseas and vulnerable people in the UK, being forced to illegally work against their will in many different sectors, including brothels, cannabis farms, nail bars and agriculture. The Modern Slavery Act, alongside the Scottish and NI acts are in line with the UN TOC Convention which the UK ratified on 6 February 2006, and with the UN Trafficking Protocol on 9 February 2006,¹⁰² And they arguably go further in not just addressing the crime of human trafficking, but also encompassing a wider definition of modern slavery.

The background to the recent UK legislation, both national and sub-national, is not just the EU Directive, but also the COE Trafficking Convention on 17 December 2008, which came into force on 1 April 2009.¹⁰³ As discussed more fully in Chapter 4,¹⁰⁴ the purpose of this Convention is to combat human trafficking as a crime, identify the victims involved, protect their integrity and focus on establishing widespread global support against human trafficking. With a substantial overlap in membership between the EU and the COE, similar, but not identical, ideas can be seen in both legal provisions.

Fortunately, the COE Trafficking Convention has a broader scope with regard to the protection of witnesses than the UN Trafficking Protocol. It not only includes trafficked victims but also includes all other co-operators with the legal agencies (ie witnesses

¹⁰² UNODC, 'Signatories to the United Nations Convention against Transnational Crime and its Protocols' <<http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>> accessed 16 November 2014.

¹⁰³ COE, 'Status of Signature and Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings' <http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Profiles/UKProfile_en.asp> accessed 16 November 2013.

¹⁰⁴ See further Chapter 4 section 4.4.3.

and those involved in human trafficking).¹⁰⁵ A question to consider here is which persons are regarded as witnesses. According to the COE Explanatory Report attached to this Convention, a witness is an individual who possesses important information regarding criminal actions. They include informers and whistleblowers.¹⁰⁶

The COE Trafficking Convention provides that the member state must ensure that the witnesses of human trafficking, as well as their family members, are provided with adequate protection.¹⁰⁷ This is why COE Recommendation 97 directly discusses this matter.¹⁰⁸ It suggests several actions that can be undertaken in order to provide safety and justice to the witnesses as per the guidelines of the COE Trafficking Convention.¹⁰⁹ These protective measures take two forms:¹¹⁰ physical assistance and psychological assistance.

Physical assistance is relatively trouble-free. It includes the provision of mobile phones to the witness or transferring them to a new location or changing their identity. Psychological assistance is more complex and comprises stabilizing the mental state of the witness and protecting them from stress. It also includes counselling the witness regarding possible threats to their life and property and also working to improve their self-confidence.¹¹¹ It is vital to develop collaborations with the police in the State of origin so that the witnesses are protected and their family also remains safe, which is difficult to manage without the help of the police.¹¹²

In the broader area of criminal law, whistle-blowers, informers, and other individuals qualify for the protective measures. All NGOs, agencies, and foundations that work against trafficking also need to be protected with similar provisions.¹¹³ According to

¹⁰⁵ Art 28.

¹⁰⁶ COE, Explanatory Report on COE Trafficking Convention para 284; COE, Committee of Ministers 'Recommendation Rec (2005)9 of the Committee of Ministers to Member States on the Protection of Witnesses and Collaborators of Justice' (20 April 2005) point 1, para 2.

¹⁰⁷ Art 28(1).

¹⁰⁸ COE, Committee of Ministers 'Recommendation Rec(1997)13 of the Committee of Ministers to Member States Concerning Intimidation of Witnesses and the Rights of the Defence' (10 September 1997).

¹⁰⁹ Art 28(2).

¹¹⁰ Art 28(1).

¹¹¹ UNODC, *Toolkit to Combat Trafficking in Persons* (UNODC 2008) 227-228.

¹¹² House of Commons, Joint Committee on Human Rights, *Human Trafficking: Twenty-Sixth Report of Session 2005-06*, vol 1 (The Stationery Office 2006) para 167, p 56.

¹¹³ Jeremy McBride, *Access to Justice for Migrants and Asylum Seekers in Europe* (COE 2009) 74.

the COE Trafficking Convention, it is important to provide protection to witnesses when necessary. In particular, physical protection is especially required during the course of trials and investigations and after the sentencing of the trafficker.¹¹⁴

Interestingly, the COE Human Trafficking Convention is the first-ever European tool that focuses on providing security to victims with a time frame for rehabilitation and reflection.¹¹⁵ Nevertheless, this researcher believes that in spite of these clauses, the UK law still needs much more detailed provisions for the adequate protection of these victims with regard to their human rights, as recognized under the ECHR, which the UK is legally obliged to respect and implement.

The UK is also a State party to the UN TOC Convention and the UN Trafficking Protocol, which also adds to the legal background to recent UK developments. The UK proposed a detailed UK Action Plan on Tackling Human Trafficking in July 2011.¹¹⁶ Unfortunately, the implementation of the Plan has faced delays.¹¹⁷ The purpose of the plan was to emphasize three important aspects of human trafficking: prevention, prosecution and protection. In order to work on these three aspects, several new bodies have to get involved like NCA.¹¹⁸ It must be pointed out, however, that the aforementioned bodies were not created purposely for dealing with human trafficking, but are being involved and tasked in the prevention of trafficking. In addition the Metropolitan Police Clubs and Vice Unit is a key player in this area in the London Metropolitan area, with counterpart units, either vice or organized crime, operating in each of the UK territorial forces, with a human trafficking unit also having been set up in Police Scotland and the Police Service of Northern Ireland. There is also a special unit for human trafficking in Police Service of Northern Ireland known as PSNI Human Trafficking Unit that plays a vital role in preventing human trafficking.

¹¹⁴ Art 28(4).

¹¹⁵ *Council of Europe Convention on Action Against Trafficking in Human Beings* (n 100) art 13.

¹¹⁶ Home Office, *UK Action Plan on Tackling Human Trafficking* (Home Office 2007).

¹¹⁷ Foreign and Commonwealth Office, *Human Rights: Annual Report 2007*, vol 7340 (The Stationery Office 2008) 61. The launch of this action plan concurred with the 200th anniversary of the UK's abolition of slavery.

¹¹⁸ The SOCA was established under the Serious and Organised Crime and Police Act 2005 in 2006. It is now a leading agency for law enforcement, which replaced the NCIS and NCS.

Despite the creation of these forces and agencies, their failure to prioritize the safety of the trafficked victims has meant that many victims are usually labelled as criminals or irregular migrants, and are treated accordingly. Although there are such legally binding requirements under the new EU Directive; however, these have yet to fully enter in force into UK law, even after the recent legislative reforms. Territorial police usually take the lead in the investigation of trafficking cases, such as the Police Service of Northern Ireland (PSNI) or Police Scotland, in their respective jurisdictions, or the various territorial police forces which operate within England and Wales, such as the Metropolitan Police and the City of London police in London. All crimes are reported to local district police, who investigate them and where necessary, the National Crime Agency will become involved. Less typically, if the NCA is conducting their own investigation into organised crime, and come across a human trafficking situation, they may be the police force first involved in an investigation, asking the local territorial forces to become involved in their investigation.

In 2014, the Scottish Government introduced the Human Trafficking and Exploitation (Scotland) Bill to strengthen the criminal law by creating a new single human trafficking offence and a maximum penalty of life imprisonment for offenders, it is now in force. This is by far beyond what is prescribed under the EU law mentioned earlier. While the EU Directive states a punishment of minimum of five years jail term, the Human Trafficking and Exploitation (Criminal Justice Support for Victims) Act (NI) prescribes its sentence to at least two years imprisonment. On the other hand, the Modern Slavery Act 2015 puts the threshold for custodial sentence to ten years. The implication of these, especially the EU directive is that the police and prosecution in Scotland may tend to prioritise resource in dealing with these cases. This has implication in the way laws will be selectively applied

It gives the right to adult victims of human trafficking to access immediate support and help.¹¹⁹ In 2015, the Scottish Human Trafficking and Exploitation (Scotland) Act 2015 received Royal Assent and filled in the gaps in the Bill. In the final Act, the relevant time period is stipulated regarding support and assistance to victim, which was not

¹¹⁹ Human Trafficking and Exploitation Act (Scotland) 2015.

included in the Bill.¹²⁰ Scotland's approach to address human trafficking has suffered for many years from legislation which is not fit for purpose. Before the Human Trafficking and Exploitation (Scotland) Act 2015 was enacted, the Scottish law lacked the coherence required to adequately address the complex nature of human trafficking. Consequently, the lack of a single definition of the human trafficking offence made prosecutions difficult and, therefore, rare. The system of support offered to survivors similarly developed over time, suggesting a lack of a clear strategy to ensure that survivors receive the care which they require. The need for new legislation was inevitable throughout UK and as the devolution settlement entrusts certain key policy areas to the Scottish Parliament, such as the criminal law and the provision of health and social services, Scotland required her own legislation to complement that introduced at Westminster and Northern Ireland.

In relation to the vulnerability of a victim, section 1 states that the victim's personal circumstances are relevant when determining their status of being subjected to forced labour. However, the scope of these personal circumstances is limited and they do not include critical vulnerabilities such as religion and ethnicity.¹²¹ The following section evaluates various national legislative efforts and frameworks pertaining to the crime of human trafficking.

5.5 UK LEGISLATIVE EFFORTS TO COMBAT HUMAN TRAFFICKING

Recently, the UK Government made key progress in combating child and adult trafficking, strengthening law in order to prosecute traffickers and introduced a formal victim identification structure known as the National Referral Mechanism (NRM).¹²² The NRM refers to the process by which people facing the danger of trafficking are identified, referred, assessed and supported across the UK by the UK government. This process was set up in 2009 following the signing of the COE on Action against

¹²⁰ *ibid.*

¹²¹ Equality and Human Rights Commission, 'Modern Slavery Bill' (2014) <[http://www.equalityhumanrights.com/sites/default/files/uploads/Modern%20slavery%20bill%](http://www.equalityhumanrights.com/sites/default/files/uploads/Modern%20slavery%20bill%20)> accessed 6 August 2015.

¹²² Rosemary Sheehan, Rhoades Helen, and Stanley Nicky. *Vulnerable Children and the Law: International Evidence for Improving Child Welfare, Child Protection and Children's Rights* (USA: Jessica Kingsley Publishers, 2012), 61.

Trafficking in Human Beings 2005. Its requirements under the COE Convention with respect to victim protection include identification and making a commitment to not remove a victim from the territory until identification is completed.¹²³ Other requirements of the NRM include assistance of victims,¹²⁴ a reflection and recovery time during the identification process (including two stages),¹²⁵ and permitting residence in specified circumstances for the identified victims of trafficking.¹²⁶ Moreover, one of the requirements includes the provision of legal assistance as well as compensation for victims.¹²⁷

The NRM system envisages that victims of trafficking have to be identified by first responders, and, after investigation, if it is deemed that there are indicators of trafficking in relation to a person's case and the person consents to referral, the respondents can refer the case to a competent authority (CA). In turn, the CA will carry out the identification process. Referrals to a CA can only be made by the first responder, including but not limited to police and local authorities. There are NGO's dedicated to providing assistance and reporting such matters. An example of this is Kalayaan, which is a small charity group that has, since 1987, offered support and pushed for the rights and migrant domestic workers in the UK.¹²⁸

5.5.1 Efforts of the UK Government against Human Trafficking

The UK faces a number of challenges in trying to devise a comprehensive definition of human trafficking that would be able to cater to all the components of both trafficking and exploitation.¹²⁹ The UK Government reported that in 2010 it spent approximately

¹²³ Art 10

¹²⁴ Art 12

¹²⁵ Art 13

¹²⁶ Art 14

¹²⁷ Art 15; Louise Hooper and Zofia Duszynska, 'Victims of Trafficking and The Law: Issues of Identification' (2012)

<http://www.airecentre.org/data/files/Comic_Relief_Materials/Bristol_Page/Presentations/Section_5.pdf> accessed 6 August 2015.

¹²⁸ House of commons, The Trade in Human Beings: Human Trafficking in the UK, Sixth Report of Session 2008-09, Vol 1 (Incorporating HC 2009) 16.

¹²⁹ Rihab A Hussein, 'The Existing Tensions in the Defining of Human Trafficking at a UK and International Level: A Critical Overview' (2014) 39(2) International Journal of Comparative & Applied Criminal Justice 129.

£40 billion in combating human trafficking.¹³⁰ Various UK organizations are involved, working with the Government to not only formulate a competent legislative system but also to prosecute the offenders accordingly. In 2010, the coalition government introduced major changes which led to the establishment of the new National Crime Agency (NCA) in October 2013 which replaced the Serious Organized Crime Agency (SOCA). SOCA was a non-departmental public body of the Government of the UK set up under the Serious Organised Crime and Police Act 2005. SOCA operated with greater powers in England and Wales and Northern Ireland than in Scotland, as the Scottish Crime and Drug Enforcement Agency (SCEDA), now merged into the new Police Scotland force, was fulfilling a similar role in Scotland and Northern Ireland. These bodies work with the Specialist Crime Division of Police Scotland and the Organised Crime Task Force (NI). Likewise, following the replacement of the SOCA with NCA, the NCA now, covers the competences of the former SOCA and its focus is on organized crime, including trafficking, kidnap and extortion, with specialist operational and intelligence analysis services which were originally part of the UKHTC and former UK Borders Agency (UKBA) border security and protection services, including trafficking and asylum issues.

The work of these agencies is to make attempts to limit the expansion of human trafficking, recognize the victims, and prosecute the offenders involved. An example of the organized attempts made by different agencies together to combat organized crime and especially human trafficking is operation 'Reflex'.¹³¹ It was conducted by SOCA¹³² and resulted in the arrest of 147 smugglers and traffickers, and the discovery of 51 criminal groups within a period of one year. Also, about £266,000¹³³ was seized

¹³⁰ Home Secretary Rt Hon Theresa May, MP, *Serious Organised Crime Agency Report and Accounts 2010/11*, HC 1241 (SOCA, London) 3.

¹³¹ Sally Almandras, 'Human Trafficking: UK Responses - Commons Library Standard Note' (*Parliament Home Page*, 16 May 2013) 18 <<http://www.parliament.uk/briefing-papers/SN04324>> accessed 16 May 2013.

¹³² It is a Home Office Non-Departmental Public Body under Home Office sponsorship under section 1 of the Serious Organised Crime and Police Act 2005 (c 15). The Agency was established in 1 April 2006 following the merger of several organisations: the National Crime Squad (NCS), the National Criminal Intelligence Service (NCIS), the National Hi-Tech Crime Unit (NHTCU), the investigative and intelligence sections of HM Revenue & Customs on serious drug trafficking, and the Immigration Service's responsibilities for organised immigration crime: SOCA Report 2010/11, p 31.

¹³³ NCS, *Annual Report: Statement of Accounts 2005*, pp 9-19.

under the Proceeds of Crime Act 2002.¹³⁴ Even greater successes were seen by SOCA in 2008. It managed to convict 6 criminal groups involved in human trafficking in the UK, rescue 16 victims, and capture and prosecute 18 traffickers who collectively received 145 years' imprisonment.¹³⁵ SOCA also made remarkable efforts in September 2011, when immense strategic aid and assistance was given by the expert UKHTC officers who were trained in handling the victims of trafficking. As a result of the inquiry that took place by Bedfordshire Police, 24 trafficked victims (of whom 19 were UK citizens) were rescued from criminal groups. Also, one female and five male offenders were charged with crimes of servitude, slavery, and forced labour.¹³⁶ Police forces across the UK are continuing to build on these earlier successes, and to share best practices as to how to tackle the crime within the UK legal and operational frameworks.

The immigration agencies (UK Visas and Immigration in the Home Office and the UK Human Trafficking Centre (UKHTC)) have also been working to combat the crime of human trafficking in the UK, along with SOCA. The efforts made and measures taken made by these agencies have been especially useful in fighting human trafficking through the implementation of strict immigration laws. These efforts were made effective through joint collaboration with the agencies in the neighbouring regions. These included the Secret Intelligence Service (MI6) in the Balkan region¹³⁷ and Danish immigration officers,¹³⁸ in order to prevent the influx of trafficked victims from countries involved in trafficking. The UK intelligence agencies (known as MI5, MI6 and GCHQ) all have serious and organised crime as parts of their remits, in addition to national security. In this way trafficking could be limited and the criminals would be sentenced. Due to efforts by the Immigration Crime Teams, more than 1000 traffickers were arrested and about £2.6 million (from April 2008 to January 2011) was seized.¹³⁹ In a more recent case a 16-year-old Vietnamese girl entered the UK illegally on 22 June

¹³⁴ 2002 (c 29) (came into force 24 July 2002).

¹³⁵ SOCA, *Annual Report 2008/09*, p 18.

¹³⁶ SOCA, *Annual Report and Accounts 2011/12*, p. 19.

¹³⁷ Ian Burrell, 'UK Experts Sent to New Front Line in War on Mafia' (*The Independent*, 22 January 2002) <<http://www.independent.co.uk/news/world/europe/uk-experts-sent-to-new-front-line-in-war-on-mafia-664545.html>> accessed 26 February 2013.

¹³⁸ Ian Burrell, 'Sex, Drugs and Illegal Migrants: Sarajevo's Export Trade to Britain' (*The Independent*, 21 January 2002) <<http://news.independent.co.uk/world/europe/story.jsp?story=115557>> accessed 26 February 2014.

¹³⁹ UKBA, *Tackling Immigration Crime: A Guide for Police* (Home Office 2011) 7.

2010, and about 31 trafficking offenders were arrested through cooperation with SOCA.¹⁴⁰

In 2007, a report titled 'Wrong Kind of Victim' was published by the Anti-Trafficking Monitoring Group (ATMG). This study analysed the work being done by the COE anti-trafficking group on Action against Trafficking in Human Beings (GRETA) with regards to human trafficking, whose role was discussed in detail in Chapter 4 of this thesis. It provided an analysis of all the characteristics of the trafficked victims.¹⁴¹ Later in 2011, the ATMG decided to implement prevention measures. Despite these efforts, the result of this research concluded that prevention is only possible through awareness programs rather than focusing on the plight and the socio-economic setup of the victims.¹⁴² There are several aspects that determine the trafficking laws in the UK, such as classification of human trafficking as being a kind of organized crime subject to the second protocol of the United Nations Convention against Transnational Organized Crime, ie the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

Records show an increase in the number of human trafficking cases over the past few years. This could reflect either an increase in prevalence of the crime, or greater skill and capacity by the various law enforcement agencies in tackling the crime, and lessons learnt in earlier success are built on and adopted by other law enforcement agencies. Home Office reports show convictions of 32 traffickers in 2009. This number increased to 35 during the period April to December 2010. Out of these 35 traffickers, 24 were sentenced under the provisions of the SOA 2003. Moreover, 2 traffickers were sentenced in 2009 for labour exploitation as per the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004. This figure increased to 8 in 2010.¹⁴³ Another case is that of a father and his son who were convicted on 26 January 2011. They were charged with trafficking for the sexual exploitation of Romanian women in a

¹⁴⁰ SOCA, 'Traffickers and Illegal Immigrants Arrested in Europe-wide Day of Action' (SOCA, 28 June 2010)

<<http://www.soca.gov.uk/news/247-traffickers-and-illegal-immigrants-arrested-in-europe-wide-day-of-action->> accessed 26 February 2014.

¹⁴¹ The Anti-Trafficking Monitoring Group (ATMG), *Report on Wrong Kind of Victim?* (June 2010)

¹⁴² Skrivankova (n 95).

¹⁴³ US Department of State. *Trafficking in Persons Report* (June 2011) 370.

Manchester brothel and were sentenced to 21 years' imprisonment.¹⁴⁴ Another case was seen in the same month, in which two British citizens were sentenced for the forced prostitution of 100 children, a few whom were younger than 12 years of age.¹⁴⁵ More cases of victims having been rescued would have occurred than the more difficult achievement of successful convictions. Law enforcement success needs to be measured using both sets of numbers.

It has been argued that in terms of protection of victims of human trafficking,¹⁴⁶ the UK Government has not been able to successfully implement Directive 2011/36/EU.¹⁴⁷ However, a change in approach is being observed as discussed in section 5.2.2.

5.5.2 Protection of Trafficked Victims by UK National Measures

There are differences in the victim protection measures in the UK and the KSA, an issue that will be developed further in the conclusions part of this thesis. One such difference lies in the provision of a temporary residence permit. In the UK, a temporary residence permit is offered to those victims who agree to assist the regulatory authorities in identifying the criminals involved in trafficking.¹⁴⁸ Article 10 of the COE Convention on Action against Trafficking in Human Beings sets out a two-stage process for the identification of trafficking victims.

Statistical reports prove that between the periods 2009 to 2012, the NRM has received 3,393 referrals and cases. Out of these 3,393, only 1,139 individuals were eventually identified as trafficked victims. Some 91 cases were rejected and the remainder are still awaiting decisions.¹⁴⁹ In 2012, 1,186 referrals were made to the NRM. Out of

¹⁴⁴ The BBC News Manchester, 'Father and Son Sex Traffickers Jailed in Manchester' (26 January 2011) <<http://www.bbc.co.uk/news/uk-england-manchester-12289968>> accessed 27 February 2014.

¹⁴⁵ US Department of State, *Trafficking in Persons Report* (June 2011) 370.

¹⁴⁶ Matilde Ventrella, *The Control of People Smuggling and Trafficking in the EU: Experiences from the UK and Italy* (Ashgate 2010 and 2013) 173.

¹⁴⁷ EU [2011] OJ L 1001/1, art 2.

¹⁴⁸ Baine Pearson and Anti-Slavery International, *Human Traffic, Human Rights: Redefining Victim Protection* (Anti-Slavery International 2002) 106.

¹⁴⁹ SOCA, *Intelligence Report: NRM Statistics April 2009 to June 2011* (SOCA) 1; SOCA, *Intelligence Report: NRM Statistics July to September 2011* (SOCA) 3; SOCA, *Intelligence Report: NRM Statistics October to December 2011* (SOCA) 3; SOCA, *Intelligence Report: NRM Statistics January to March 2012* (SOCA) 3; SOCA, *Intelligence Report: NRM Statistics April to June 2012* (SOCA) 3; SOCA, *Intelligence*

these, 400 were males (34%) and 786 were females (66%), from a total of 95 states of origin.¹⁵⁰ This is a 25% increase on the previous year.

Categorizing the cases in terms of the nature of exploitation, the 2012 UKHTC Assessment Report stated that sexual exploitation and forced labour have been the most common forms of exploitation. In 2012, out of the 400 individuals, only 12 were males, and with regard to labour exploitation, out of 370 referrals, 292 were men.¹⁵¹ However, the NRM Report 2012 does not report the final total number of individuals that were identified as trafficked victims; it only provides a number of 240 for those given a Positive Conclusive Decision in September 2012.¹⁵² However, it is likely that there is no statistical data for individuals who agreed to assist the law enforcing authorities, and this may be for the purpose of protecting the identity of such individuals.

Moreover, the data available with regard to child trafficking is limited. The NRM states that 29% of all the trafficked cases reported are children. Also, these children are generally used for forced labour (to perform domestic work, forced begging, work on farms for harvesting, and work in factories in unhealthy environments) more than for sexual exploitation.¹⁵³ This fact is important because it allows the authorities to locate the places where it would be most likely to find such victims, and also to identify the services that would help in finding these victims.

There are also some limited indirect supports at the level of civil society. The British Home Office for instance funded a project called The Poppy Project, which offers some limited amount of support through the provision of shelter to trafficked women (not minors). In its bulletin, the Project claims that children do not receive support and that they are put through the immigration and asylum processes in the UK without

Report: NRM Statistics July to September 2012 (SOCA) 3; SOCA, Intelligence Report: NRM Statistics October to December 2012 (SOCA) 3.

¹⁵⁰ SOCA and UKHTC, *UKNRM Provisional Statistics 2012*, p 1. Of 1,041 referrals from England, 96 referrals from Scotland, 34 referrals from Wales, and 15 referrals from Northern Ireland; *ibid*.

¹⁵¹ The figure of victims of domestic servitude was 164 (146 females and 18 males), and unknown exploitation was 171 (93 females and 78 males) in the same year: (*ibid*). However, the figure from April 2009 to 2011 was 326 of victims of sexual exploitation, followed by 301 victims of labour exploitation, 115 victims of domestic servitude, and 65 victims of unknown exploitation.

¹⁵² SOCA, *Annual Report and Accounts 2011/12* .19

¹⁵³ Colin Walker, 'Child Trafficking in England and Wales' (Bringing Human Trafficking Out of the Conference, Cardiff, November 2012).

identification of their need to be protected from human traffickers. Another example of a project involved in protecting the victims of trafficking is the Trafficking Awareness Raising Alliance (TARA) Project in Glasgow, Scotland.¹⁵⁴ This is a civil body involved in assisting the female victims of trafficking referred from Scotland. Victims must be at least 18 years of age and have been forced into prostitution. Funding of £724,000 was provided by the Scottish Government in 2012–2013 to the TARA Project. Assistance provided to these women is in the form of appropriate and updated sexual healthcare, secure accommodation, psychological evaluation and awareness, legal assistance, and joint risk evaluations with safety protocols and law enforcement that constitute supported planned returns.¹⁵⁵ The total number of females referred to the TARA Project from its inception until the end of 2012 was 270. These victims were trafficked for the purposes of domestic servitude. Between April 2012 and March 2013, there were 74 referrals a 61% increase since 2011. Moreover, the Department of Justice of Northern Ireland funds the Migrant Help and Women's Aid (MHWA). This agency has helped in the recovery of 81 trafficked females between 2009 and 2012, out of whom 59 were victims of sexual exploitation and 19 were victims of labour exploitation.¹⁵⁶ As there were no published outputs, the researcher contacted the MHWA to determine the total number of referrals made to them but received no reply.

5.6 EVALUATION OF THE UK'S NATIONAL ANTI-TRAFFICKING EFFORTS

There have been several developments towards combating THB across the UK, including the review of existing legislations and penal policies. Yet, a close analysis of these developments reveal that they were slow, but are incremental. This situation is partly attributed to the fact that each of these legislations took some time before its weaknesses were discovered and recommendations for review and improvement

¹⁵⁴ It was established in 2005 as a part of Glasgow Community and Safety Services (GCSS). It liaises with the police, housing departments, health professionals, and agencies which work with women in the sex trade <<http://www.scotland.gov.uk/Publications/2009/03/31164935/2>> accessed 27 February 2014.

¹⁵⁵ IDMG, *First Annual Report of the Inter-Departmental Ministerial Group on Human Trafficking* (The Stationery Office 2012) 44-46.

¹⁵⁶ *ibid.*

made. Being that new laws have only just been passed, it would take some time to identify and measure their practical effectiveness and weaknesses.

The crime of human trafficking is seen as a predominantly transnational crime by the UK Government. For this reason, it has devised strict border control and immigration policies to combat this crime.¹⁵⁷ It is however logical to raise a related matter here: whether the issues related to human trafficking are well understood by the law enforcement agencies or not. This raises the issue of appropriate training, and priority and target setting by line managers. This analysis is important because the more confusion, the more mistakes. As noted by some civil society groups, including the Anti-Slavery International, there are several instances where victims of trafficking are simply viewed by the immigration authorities as cases of regular migration.¹⁵⁸ This has led to labelling some victims of trafficking as people who abused immigration laws rather than as victims who should be protected and supported.¹⁵⁹ These individuals are detained until their date of departure.¹⁶⁰ A study conducted by Hales and Gelsthorpe¹⁶¹ in 2012 on 103 foreign immigrant women in five prisons in the south east of England proved that failing to identify the victims of trafficking results in their inappropriate arrests for other crimes. These individuals are usually charged with the production of cannabis or for making use of forged documents to stay in the UK, despite the fact that their involvement in these crimes is involuntary and a result of their victim status. Such unfair criminalization, especially of women, has caused a great deal of concern among the law enforcement authorities.¹⁶²

As noted by the Inter-Departmental Ministerial Group on Human Trafficking (IDMG) in 2012, the prosecution of traffickers in the UK has been limited.¹⁶³ This is

¹⁵⁷ See further, for example, Home Office, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain* (CM 5387) (Home Office 2002).

¹⁵⁸ Women's Commission for Refugee Women and Children (WCRWC), *The Struggle Between Migration Control and Victim Protection: The UK Approach to Human Trafficking* (WCRWC 2005) 35.

¹⁵⁹ Pearson and Anti-Slavery International (n 148) 108.

¹⁶⁰ UNHRC, 'Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Ireland (6 December 2001), CCPR/CO/73/UK and CCPR/CO/73/UKOT, para 16.

¹⁶¹ Liz Hales and Loraine Gelsthorpe, 'The Criminalisation of Migrant Women' [2012] Institute of Criminology, University of Cambridge, 77-78.

¹⁶² Liz Hales and Loraine Gelsthorpe, 'The Criminalisation of Migrant Women' [2012] Institute of Criminology, University of Cambridge, 77-78.

¹⁶³ IDMG (n155) 32, para 4.

predominantly because the victims are reluctant to identify their traffickers out of fear of being punished by the traffickers if caught, and also because they believe that their testimony would not be accepted by the authorities. Empirical evidence has shown that often, trafficked victims are frightened of the aftermath of doing anything against the will of their traffickers.¹⁶⁴ Consequently, the law enforcement agencies have to resort to other ways of prosecuting the traffickers. One such way is the 'Al Capone' approach,¹⁶⁵ (named after the US mafia boss of the 1920s) which involves other charges being brought against traffickers, such as money laundering, violence, and rape. This prevents the traffickers from escaping punishment, even if the punishment is for crimes other than human trafficking for forced labour. This shows that traffickers are most often prosecuted with offences other than human trafficking, and the punishments for these crimes have traditionally been even stricter than trafficking charges. But as noted earlier, some legislations have brought in very serious penalties for Human Trafficking, including life sentence. Yet, the small number of convictions resulting from human trafficking as a primary charge gives the impression that the crime is often not properly investigated.¹⁶⁶

The UK law enforcement agencies are dedicated to formulating strategies aimed at prosecuting offenders for various crimes. Their efforts need to be in line with UK, EU and international laws and regulations. Lastly, it is important to mention here that in spite of the 189 individuals that were identified as victims of forced labour by the NRM in mid-2011, there have been few convictions of labour traffickers pursuant to the then in force CJA 2009.¹⁶⁷ In addition, in England and Wales trafficking for sexual exploitation under sections 57, 58 and 59 of the now repealed provisions of the Sexual Offences Act 2003¹⁶⁸ had increased from 18 cases in 2005–2006 to 113 cases in 2011–2012. Trafficking for other sexual purposes under section 4 of the Asylum and Immigration Act 2004 had increased from 0 in 2005–2006 to 37 in 2011–2012. Moreover, offences of forced labour and servitude under section 71 of the Coroners

¹⁶⁴ Zimmerman, C. et al. (2003). The health risks and consequences of trafficking in women and adolescents: Findings from a European study. London: London School of Hygiene and Tropical Medicine.

¹⁶⁵ House of Commons (n 112) para 159.

¹⁶⁶ Ibid 161.

¹⁶⁷ SOCA, *Intelligence Report: NRM Statistics April 2009 to June 2011* (SOCA 2011) 1.

¹⁶⁸ This is now out of date.

and Justice Act 2009 (CJA) had increased from none in 2005–2006 to 15 in 2011–2012. Furthermore, the number of convictions in 2009 was 23, reducing to 8 in 2011, and the number of convictions for non-sexual exploitation reduced from 2 in 2009 to 0 in 2011.¹⁶⁹ As stated earlier in this chapter, new laws now apply in the UK to cover all of these forms of human trafficking. Moreover, NGOs such as Kalayaan¹⁷⁰ in the UK have been involved in assisting migrant domestic workers. The majority of these workers have been victims of servitude or slavery, physiological abuse, being locked up, being beaten, and being sexually abused. NGOs provide an insight that the issue is much bigger than reported cases, as victims of trafficking who are mistreated do not have the courage to report their suffering due to fear of losing their immigration status and the need to work to support their families. It is also indicated that about 300 domestic employees accompany diplomatic employers to the UK each year.¹⁷¹ However, no record of conviction of their offenders has been recorded. It is therefore clear that the UK lacks the appropriate experience, resources, and vocational training programs to combat this issue.¹⁷²

¹⁶⁹ Ministry of State for Immigration, *Report on the Internal Review of Human Trafficking Legislation* (May 2012) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/97846/human-trafficking-legislation.pdf> accessed 29 June 2014.

¹⁷⁰ It was established in 1987 to provide advice, advocacy and support services in the UK for migrant domestic workers. It works with all migrant domestic workers regardless of nationality, gender, physical ability, religion or age. Kalayaan registers approximately 350 new migrant domestic workers each year Kalayaan<<http://www.kalayaan.org.uk/>> accessed 29 February 2014.

¹⁷¹ Giuseppe Gaburro, 'Domestic Slavery: Servitude, Au Pairs and Mail-Order Brides' (2004) COE Documents: Working Papers Vol IV, Doc 10110-10173, paras 11, p 266.

¹⁷² Lord Wilberforce, HL Deb 13 March 2002, vol 632, col 899W.



Figure 1 Trafficking routes to the UK¹⁷³

Figures also show that about 1,400 females are trafficked in the UK annually for the purpose of sexual exploitation.¹⁷⁴ Also, more than 70% of the forced prostitutes belong to Eastern Europe.¹⁷⁵ The Metropolitan Police presented an estimate in which it said that about 11,800 females were trafficked into England and Wales in 2011 with the same purpose. It can be said that at least 10,000 individuals are deemed part of this crime in the UK.¹⁷⁶ Furthermore, the UK also faces the issue of child trafficking; data records prove that about 10,000 children belonging of Africa origin have been victims of this crime with the purpose of forced labour, sexual exploitation, enslavement to foreign individuals within the UK,¹⁷⁷ and credit card scams.¹⁷⁸ Since the control on

¹⁷³ BBC, 'Sex Trafficking Routes to the UK' (BBC) <<http://news.bbc.co.uk/1/shared/spl/hi/guides/456900/456985/html/>> accessed 24 February 2015.

¹⁷⁴ Liz Kelly and Linda Regan, 'Stopping Traffic: Exploring the Extent of, and Responses to, Trafficking in Women for Sexual Exploitation in the UK' (Police Research Series Paper 125, Home Office, 2000) 22.

¹⁷⁵ United Nations Children's Fund (UNICEF) UK, *End Child Exploitation: Stop Traffic!* (UNICEF UK 2003) 12.

¹⁷⁶ Mark Townsend, 'Trafficking Victims Lured to the UK: Locked Up and Raped at £30 a Time' (*The Guardian*, 14 May 2011) <<http://www.guardian.co.uk/law/2011/may/14/trafficking-victims-lured-to-england-locked-up-and-raped>> accessed 13 January 2013. These prostitutes are working in Birmingham, Manchester, Glasgow, and Cardiff; Ian Burrell, 'Police "ignore vice trade from Eastern Europe"' (*The Independent*, 23 January 2002) <<http://www.independent.co.uk/news/uk/crime/police-ignore-vice-trade-from-eastern-europe-665977.html>> accessed 29 October 2013.

¹⁷⁷ UNICEF UK (n 84 in ch 6) 13.

¹⁷⁸ Caron Somerset, *What the Professionals Know: The Trafficking of Children Into, and Through, the UK for Sexual Purposes* (ECPAT 2001) 22.

departure flights is lenient due to the number of British nationals who fly abroad regularly, the UK is now being seen as a state of transit,¹⁷⁹ and hence the UK serves as a transit country for traffickers from Eastern Europe to Western Europe.

This researcher argues that it appears that the UK and the KSA have different reasons as to why they are used for the purpose of trafficking, mentioned below is a comprehensive analysis of the matter and the manner in which this crime has led to labour and sexual exploitation.

5.7 COMPARATIVE ANALYSIS OF HUMAN TRAFFICKING LEGISLATION IN THE UK AND THE KSA

A comparative analysis of the legislation of the UK and the KSA shows that combating human trafficking as a crime is a primary concern for both States. As a result, the UK and the KSA seek to not only criminalize the associated crimes but also prosecute the offenders. They both realize the significance of criminalizing human trafficking and prosecuting the offenders through a specific anti-trafficking law (as in the KSA part of this thesis)¹⁸⁰ or in the laws applicable across the UK. The researcher believes that in order to combat human trafficking as a crime, it is important to have regard to all of its aspects equally. Accordingly, it is important for the KSA Government to formulate a strategy that focuses on prosecuting offenders, just like the UK does.

Unfortunately, it has been observed that the criminalization of trafficking in the KSA is only mentioned in the KSA 2009 Trafficking Law, despite the existence of other relevant laws. It must be noted here that the KSA 2009 Trafficking Law corresponds with Modern Slavery Act 2015 in the UK, as it applies to England and Wales.¹⁸¹ Therefore, essentially both laws seek only to criminalize human trafficking and other crimes that affect State sovereignty. Moreover, other laws too are specific and only aim at combating human trafficking as a crime. For instance, the 1974 Saudi Arabian

¹⁷⁹ Kelly and Regan (n 83 in ch 6) 19

¹⁸⁰ See further Chapter 6 section 6.4.

¹⁸¹ In addition the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 and Human Trafficking and Exploitation Act (Scotland) 2015.

Border Security Law prohibits human trafficking, but fails to include provisions pertaining to the prosecution of traffickers, even though it has a strong relationship with the Border Security Law.¹⁸²

Another important matter is the distinction that needs to be made between trafficked victims and irregular immigrants. This should be set out in the Border Security Law in order to avoid confusion. While analysing the historical development of anti trafficking legislations in the UK, the AICA 2004 which is not in force now appears to be better equipped in this regard. Its provision for human trafficking under articles 1–6 set out that a crime is deemed to be one of human trafficking if it fulfils three conditions which include facilitating or arranging the movement of a person into, out of, or within the country with the intention of exploitation; aiming to take advantage of the individual and having a belief that the individual would be exploited by someone else on arrival in the new region.

It is necessary for the legislation of the KSA to incorporate these provisions within the 1974 Saudi Arabian Border Security Law. This would likely increase the efficiency with which traffickers are identified and prosecuted, as per the 2009 KSA Trafficking Law.

Furthermore, the 2005 Saudi Labour Law also does not include an update regarding the issue of trafficking for forced labour. As a result, it fails to be dealt with properly by KSA law. This comparison of the legislation of the UK and the KSA clearly shows that the UK has been more efficient at combating, criminalizing and prosecuting human trafficking offences and offenders for labour and sexual exploitation.

Notwithstanding the efforts made by the legislation of the two countries, trafficking is being seen to increase. Moreover, the offenders are escaping prosecution because the agencies are more focused on deporting and detaining the victims. As a result, the victims lose their right to protection and are returned to their homeland where they face an increased risk of re-victimization. This is occurring because of the approach of

¹⁸² Saudi Border Security Law (*Bureau of Experts*)
<<http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=226&VersionID=30>> accessed 12 June 2014.

the authorities prioritize deportation of the victims over the prosecution the traffickers, in order to protect the sovereignty of the region.¹⁸³

The researcher suggests that training on anti-trafficking measures should be mandatory to ensure that the law enforcement agencies, judiciary, prosecutors, first responders, and related officials have a clear understanding of the aspects of human trafficking offences. Convictions should also be given high priority. Other factors such as dependency also need special attention.

In addition, cooperation between the competent authorities achieves the best results when combating human trafficking rather than a separated approach. Thus, the competent authorities in the KSA could benefit from these UK experiences by similarly uniting KSA law enforcement efforts to assure greater prevention of the crime of trafficking.

The major factor that still hinders the judicial organizations in both these countries, however, is the fact that greater emphasis is still on sexual exploitation and forced prostitution as the primary type of human trafficking. This means that there remains a lack of proper understanding of the various kinds of human trafficking like forced labour. As neither of the countries have instances of arrests for forced labour, it is apparent that law enforcement agencies require greater guidance in this regard, as the figures show how many people have been forced into working as labourers. These workers are generally male, who have been moved from unfortunate areas and employed, and the government is usually unable to deal with this type of trafficking because of decreased powers. Moreover, guidance only is not sufficient. It is therefore essential for the states to collaborate on this issue, specifically those countries involved in trafficking labour, such as East Asian countries and the KSA and the UK. Also, it would be beneficial to provide expert training for both proprietors and workers, to assist them in recognizing what human trafficking of labourers includes and how to deal with it. Many employees who suffer mistreatment are not even aware of the fact that they are the prey of traffickers for forced labour. Although such

¹⁸³ NCCTP, 'NCCTP Strategic Plan' (NCCTP 2013) <<http://nshr.org.sa/>> accessed 2 November 2014.

measures as training on anti-trafficking and prioritising convictions have been extended, but the basic framework still runs along the contemporary lines.

Moreover, scrutiny of the UK law enforcement should reflect the task assumed by NGOs, which are virtually non-existent in the KSA, where all enforcement agencies are headed by the Government. In the UK, all enforcement agencies are supervised by the Government, but NGOs do not have legal capacity and therefore are not considered as enforcement agencies. Despite understanding the role of NGOs (such as GAATW and End Child Prostitution and Trafficking (ECPAT)) in combating human trafficking and protecting UK targets, they persistently face shortages in funding and supplies.¹⁸⁴ Psychological and judicial assistance required by the victims of human trafficking are not freely offered without funding from the Government, thereby decreasing their delivery. The duty of disclosure is also different in the UK and KSA. In the KSA, NGOs must participate in this effort by informing the authorities as soon as it is discovered. However, the NGOs in UK need to report individual crimes with the consent of victims. Aid agencies in the KSA must also become involved in focusing on the problems of supporting the victims of trafficking due to their vulnerability.

Protecting the victims of human trafficking is essential, and defending traded individuals is essential from the point of view of human rights, and is an important aspect in combating this phenomenon. Yet, recent investigations show an absence of assistance and protection, or only partial protection. Inadequacy of protection is apparent in the UK, where there are very few organizations, with limited remits, to assist a large number of victims (eg the Poppy Project, the TARA Project, and the MHWA). It is important to note that there are a number of issues surrounding the workings and even the geographical spread of NGOs in the UK and in the KSA, but that is not what this study intends to interrogate. Although there are other ways to protect victims in the UK, these are limited to particular types of trafficked victims who are evaluated according to specific criteria. Even though the NCCTP ensures¹⁸⁵ that the victims of trafficking are assisted and protected by being provided with a home and

¹⁸⁴ ATMG, 'Briefing: Assistance to Trafficked People' (ECPAT London, January 2011).

¹⁸⁵ The Saudi Human Rights Commission's Standing Committee to Combat Crimes of Trafficking in Person, *Report of Human Trafficking in Saudi Arabia* (2012); NCCTP, 'NCCTP Strategic Plan' (NCCTP 2013) <<http://nshr.org.sa/>> accessed 2 November 2014.

psychological and social help, with many branches in various cities overseen by the Government, they are only concerned with providing assistance to women and children (as happens in the UK) who have been sexually exploited and turned into in-house servants. The protection is only provided to women and children (not to men) and under certain conditions, based on historical issues. Hence the researcher believes that protecting the victims of human trafficking in the KSA is not enough, even though it is only for females and children, as does not restrict provision of assistance to victims. Conversely, the UK should create more organizations to deal with an increasing number of victims since there are currently very few. In addition, it should develop and increase the capacity of current providers to ensure that all types of victims of human trafficking are protected by the law. Moreover, the UK must re-evaluate what is required to assist the organizations that provide assistance. The trafficked victim is vulnerable and should be assisted rather than neglected. Both countries should re-evaluate places to be allotted to male victims of forced labour. These victims are continuously increasing, more so than their female counterparts.

It is evident from Chapter 3¹⁸⁶ that there is a difference between smuggling and trafficking, and this difference ultimately requires a change in the methods used to deal with smugglers and traffickers. However, the victims of trafficking receive the same treatment as smuggled ones since both may be deported, unless they are prepared to assist the authorities in the UK.

Moreover, providing temporary accommodation is a protection strategy that is not afforded to victims in the KSA, in contrast to the UK where this is provided, albeit to very few of trafficked victims. The targeted individual who does not have a legal residence is not permitted to stay in the KSA after the case has been dealt with or, in certain instances, during the court hearings (depending on the Public Prosecutions' evaluation) even if he/she has been assisting the enforcement agencies or authorities. Victims in the UK are more fortunate, as such assistance may guarantee the grant of a permanent residence permit granted under the Nationality Immigration and Asylum Act 2002. However, the victims are not always granted asylum and claims of asylum by

¹⁸⁶ See further Chapter 3 section 3.3.

victims of slavery and forced labour are also denied in some instances.¹⁸⁷ Asylum is required by those victims from poor countries so that they can benefit from the asylum system which is not acknowledged by the KSA. The researcher believes that KSA should consider the use of this type of measure, even just for a short period, as it would assist the agencies in dealing with traffickers as well as help the victims of trafficking for more time on grounds of assisting humanity. Even though the conditions for prosecuting traffickers are more favourable in the UK than in the KSA, the requirement of getting them assistance for prosecution seem less important. Safeguarding the country's security and dealing with the traffickers is more important than helping the victims in the UK. Thus, the researcher believes that the UK authorities should re-evaluate the problem and provide shelter to trafficked victims to ensure that they are not vulnerable to being re-trafficked or avenged by their traffickers. If the victims do not assist the law enforcement agencies, and they have an irregular migrant legal status, they are deported instantly and face being trafficked again into the UK in similar circumstances as before, thus nullifying the agencies' previous efforts.

As the identification of the victims of trafficking is necessary and depends upon protection and assistance being provided, the creation of the NRM, based on the COE Convention, is deemed to be a sign of improvement in the UK. Thus, the KSA Government must develop a similar mechanism, and utilize an NGO that does not depend on the public prosecution body to confirm the victims of trafficking. This is because it rests on ascertaining the circumstances and psychological factors of trafficked victims (who may be considered victims), which is not easy for prosecutors and police.¹⁸⁸

¹⁸⁷ Aubrey Allegretti, 'Slavery Victims Denied Asylum in One Third of Cases, Home Office Admits' (*The Huffington Post UK*, 28 October 2015) (*The Huffington Post UK*) <http://www.huffingtonpost.co.uk/2015/10/28/modern-slavery-asylum-application-one-third-home-office_n_8406870.html> accessed 15 November 2015.

¹⁸⁸ The Ministry of Social Affairs in the KSA makes assistance and protection available to victims of domestic violence and trafficking in persons through the provision of shelters and psychological and social support. However, the social care of these categories is not confined solely to the provision of shelter; it also extends to the provision of various types of financial aid, rehabilitation, training and vocational assistance for those in need of employment.

Ultimately, trafficked individuals should not be criminally liable for offences committed because of being trafficked, such as creating false passports, if this was done under duress. The organized crime gang abusing the victim should be held responsible for this crime. The researcher believes that there should be a shift to the approach of considering the trafficked victim as lacking responsibility. This affords greater protection to the victim if it is proved that he is the victim, irrespective whether he has breached immigration laws or committed a crime, by relying on the defence of coercion, such as in cases of forced prostitution and forced labour.

5.8 CONCLUSION

This chapter has shown the effect of national legislation on human trafficking in the three main jurisdictions of the UK. It has provided an evaluation of the national laws used to combat human trafficking and to deliver essential methods to protect trafficked individuals. The conclusion that is derived from this evaluation is that even though national laws to combat human trafficking exist, such laws are often ineffective in dealing with some elements of trafficking, like the psychological and physical harm suffered by the victims. Full assistance through the measures set out in the UN Trafficking Protocol and the COE Trafficking Convention are not completely provided by the UK. Victims may go missing and cannot access the assistance they need. Modification of protection for specific kinds of human trafficking victims has resulted in a loss in the provision of rehabilitation and assistance for others. This is evidenced by the fact that the law only provides assistance and support to females and not males.

The victim in the UK is used to assist in the prosecution of the trafficker rather than being seen as someone who is in separate need of protection and assistance. This leads to the creation of many loopholes and the ineffectiveness of services for human trafficking victims within the state.

In addition, all that the Government has done does still not guarantee prosecution, prevention and assistance. Therefore, it is likely they cannot achieve their target because they prioritize the deportation of irregular immigrants, even when they are proven to be victims. Hence, border protection is now considered more important than safeguarding the human rights of targeted individuals and prosecuting the traffickers.

Using or implementing the description of human trafficking factors (such as autonomous felonies in the UN Trafficking Protocol and the COE Trafficking Convention) by the comparator countries has created gaps in the structure of law, thereby impeding the conviction of traffickers. Moreover, even though the anti-trafficking legislation in the UK has developed slowly, errors have resulted, such as the disparity between the numbers of criminals that have been detained and those who have been charged. Undoubtedly, this disparity has occurred due to the issues in implementing the legislation.

CHAPTER 6: HUMAN TRAFFICKING IN THE KSA

6.1 INTRODUCTION

This chapter explores the connection between human trafficking and the laws formulated for it in the KSA. The chapter aims to analyse human trafficking from an Islamic perspective. This involves analysing how Islamic rules strictly prohibit activities associated with human trafficking. It will also explore how Islamic commandments prohibit the act of human trafficking and the prescribed punishments for the various types of trafficking. The Saudi judicial system and courts (pursuant to the Judiciary Law, Royal Decree No M/78 promulgated in 2007) will also be discussed. The chief aim is to analyse the Islamic human trafficking laws and to demonstrate how Saudi law implements Islamic law in all judgments. Given the fact that human trafficking is dealt with in conjunction with the laws of the *Iqama* and *Kafala* system, it is important to assess the regulations implemented to combat illegal entry in the KSA.

The second section of this chapter deals with the national legislation pertaining to human trafficking in the KSA. The reason for choosing the KSA and the UK for this thesis is that these two countries face a large threat of human trafficking, both in terms of transit and destination. It has been previously argued that it is not appropriate to compare the KSA and the UK over this issue, primarily because the two regions lack any similarity in terms of their cultures, politics, and jurisdiction. However, the researcher believes that the similarity of the prevalence of human trafficking in both these regions outweighs all the differences. Another similarity is that both countries are a member of the UN TOC Convention and the UN Trafficking Protocol, which are two fundamental tools against human trafficking globally. As a result of these two similarities, the researcher attempts to analyse the legal systems of the two States with respect to this crime, and particularly address the shortcomings of the KSA system in comparison to the UK system.

It is noteworthy that this comparison is more interesting due to the fact that the UK is an active part of the ECHR and has developed greatly in this regard. The ECHR is an

important legal framework for European countries in developing laws to combat human trafficking for forced labour. Since the KSA is not a part of the ECHR, this thesis shall analyse the benefits that the KSA is missing out on. Thus the researcher believes that comparison between the legal systems of the two states is entirely appropriate to address the issue at hand.

However, before moving onto the comparison, the researcher seeks to explain the Saudi legal system and which Islamic rules strictly prohibit activities associated with human trafficking. After this analysis, the researcher presents a comparative study of the national laws of the two regions, the implementation of laws, and the protection of the victims involved. The aim of this comparative study is to recognize the loopholes in the system of the KSA in comparison of that of the UK for combating human trafficking, and to make suggestions for further development in the KSA.

6.2 GENERAL BACKGROUND ON THE KSA LEGAL SYSTEM

6.2.1 The KSA: Background Information

Spread over four fifths of the Arabian Peninsula, the KSA is the biggest country in Western Asia, with respect to the area it covers.¹ It has seven neighbouring countries. To the east lie Qatar and the United Arab Emirates, to the south are Yemen and Oman, and to the north are Jordan, Iraq and Kuwait. Moreover, the KSA also has two lengthy coastlines. These are the Red Sea lying to the west, and the Arabian Gulf lying to the east.² Due to these topographical benefits, the country is quite positive about its shipping expertise, particularly via the Suez Canal and the Arabian Gulf. Together with this, this country is also a part of the Gulf Cooperation Council (GCC)³ as well as the League of Arab States (LAS).⁴ Riyadh is the capital of Saudi Arabia and Arabic is its official language. According to the recent official statistics, the population of this

¹ Kingdom of Saudi Arabia, 'Ministry of Foreign Affairs' < <http://www.mofa.gov.sa/sites/mofaen/Pages/Default.aspx> > accessed 22 January 2014.

² *ibid.*

³ Gulf Cooperation Council website <<http://www.gcc-sg.org/indexc64c.html?action=GCC>> accessed 28 January 2014.

⁴ League of Arab States website <<http://www.lasportal.org/>> accessed 28 January 2014.

country was 29,994,272 in 2013. This figure included 9,723,214 foreign nationals.⁵ The annual population growth rate of the region is 2.7%.⁶ The Gross national income (GNI) of Saudi Arabia ranks it on number 23, globally. 0.77 is the Human Development Index Value of this country, giving it the 56th position in the world amongst the quintile of highly developed countries.⁷

6.2.2 The Islamic Legal System and its Main Sources

Many international laws work to rectify the issues involved in human trafficking. Nevertheless, Islamic laws provide an even better approach, for Islamic minded countries, by which to help reduce this crime. These laws focus on the UN Trafficking Protocol principle and implement ideas that assist in considering these aspects. Before discussing the laws relating to human trafficking, it is first vital to understand the basic Islamic legal system, which is unique in its attributes.⁸ Law is described in Islam in a manner that differs from other definitions of 'positive laws'. Despite the fact that in many Islamic countries the laws are based on the European civil law systems, this does not negate the role of Islamic law in issues of human trafficking.⁹ The spiritual root of Islamic law discriminates it from civil laws. Civil laws are the result of government legislations and courtroom decisions, whereas Islamic laws have their foundations in religion. The meaning of the word 'Islam' is to give in or agree to God's decree. Many different terms have been employed to refer to the word 'law' in Islam. One such is 'sharia' which means 'way to be followed'.¹⁰

⁵ Central Department of Statistics & Information website <<http://www.cdsi.gov.sa/english/>> accessed 9 February 2014.

⁶ *ibid.*

⁷ UNDP, *Human Development Report 2011* (United Nations 2011).

⁸ William Tetley, 'Mixed Jurisdictions: Common Law vs. Civil Law' (2000) 60 Louisiana Law Review 677 <<http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=5822&context=lalrev>> accessed 20 June 2013.

⁹ Robert Adriaansen, 'At the Edges of the Law: Civil Law v. Common Law: A Response to Professor Richard B. Cappalli' (1998) 12 Temple International and Comparative Law Journal 107.

¹⁰ Mohammad H Fadel, 'Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights' (2008) 8 Chicago Journal of International Law 1; Clark B Lombardi and Nathan J Brown, 'Do Constitutions Requiring Adherence to Shari'a Threaten Human Rights? How Egypt's Constitutional Court reconciles Islamic law with the Liberal Rule of Law' (2006) 10 American University International Law Review 379 <<http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1054&context=auilr>> accessed 13 November 2013.

Islamic laws are derived from four principle sources, as described below.

6.2.2.1 *The Koran*

The principal source of Islamic law is the Koran, which was revealed to the last messenger, Prophet Mohammad (PBUH), for human guidance. The Koran administers both legal and religious commandments. Islamic policies establish a demarcation between *Muamulat* (legal relations) and *Ibadat* (devotional obligations). *Muamulat* comprise family laws, such as those governing marriage, inheritance, property, war and peace, etc., whereas *Ibadat* cover the five pillars of Islam.¹¹ About 500 of the 6,239 Koranic verses concern family, criminal offences, and other provisions relating to human life. The Koran says: 'We made for you a law, so follow it' (65:8).

6.2.2.2 *The Hadith*

The other chief source is the Hadith (also called the Sunnah). This comprises the actions and sayings of the Prophet Mohammad Peace Be Upon Him (PBUH), as compiled by his followers.¹² The Koran affirms the significance of the Sunnah: 'Oh you, who believe, obey God and his messenger' (4:136). Thus, the Sunnah provides details, clarifications and conclusions of the teachings given in the Koran with the help of the words and deeds of the Prophet. There are consequently two kinds of Sunnah: Sunnah by actions and Sunnah by sayings.

6.2.2.3 *The Ijma*

The third source is called Ijma, also referred to as 'consensus'. This is the establishment of law based on conformity of the Muslim scholars. The Koran says: 'Obey God's his Prophet and those in charge of your affairs' (4:136). Moreover, according to a Hadith

¹¹ The five pillars of Islam are: faith in God and his Prophet, prayer, fasting, alms giving, and the pilgrimage to Makkah. On the general principles of the religion of Islam, see, for example, Sayyid Qutb, *Basic Principles of the Islamic World View* (Islamic Publications International 2006).

¹² Memory is the basis of many of the Islamic traditions. Muslim researchers of Hadith base their thought process on two aspects of a Hadith: these are the material of the hadith and its relation to the Koran, together with its narrators. The narrators of every tradition of the Prophet need to be established, which then divides the tradition as being *Mutawatir* or *ahad*. The former is narrated by a large group of people, and is therefore authentic, whereas the latter is reported by only a few.

reported by Ibn Hanbal, Tirmidhi, Ibn Majah and others,¹³ 'My people shall never be unanimous in error'; the Prophet trusted his followers to be impartial about mistakes in tradition.

6.2.2.4 The Qiyas

The fourth source is Qiyas, also referred to as 'reasoning'. This is the application of pre-existing laws to modern issues. For Qiyas to be applicable, four factors have to be considered: 'Asl' the previously present case; 'far' the new issue; 'Illah' – similarity between the Asl and Far; and *Hukm* which is the law resulting using Qiyas.¹⁴

In summary, Islamic laws are based on two literary sources, the Koran and the Hadith, an authority called *Ijma*, and a source of analysis called *Qiyas*. When a dispute arises, the following sequence is adopted: the Koran, the Sunnah, then reasoning.¹⁵

6.2.2.5 The Ijtihad

Fiqh, or Islamic jurisprudence, is a scholarly method of discerning Islamic laws. *Ijtihad* refers to the analysis and interpretation of Islamic laws to pass official judgments. The main schools of thought regarding the division include *Maliki*,¹⁶ *Hanafi*,¹⁷ *Shafi*,¹⁸ and *Hambali*,¹⁹ the last of which is the main, and state approach to Islamic law in Saudi Arabia. Due to its spiritual provenance, Islamic law is considered to be complete and perfect. Moreover, the law is fair, and is derived on the basis of honesty and righteous reasoning. Another difference from positive laws is that Islamic rules are not

¹³ *Ijma* is of two kinds. It can either be active *Ijma*, where all scholars have the same point of view; or passive *Ijma*, where scholars have different points of view about a matter.

¹⁴ An example of *Qiyas* can be offering Hajj for someone else. The Prophet was approached by a woman who enquired whether it was okay for her to perform Hajj for her father, to which the Prophet agreed. Another example is that of activities being carried out during Jumma prayers. As the prophet disliked sales transactions during this time, all other transactions are also disapproved of.

¹⁵ Nazeem MI Goolam, 'Ijtihad and its significance for Islamic legal interpretation' [2006] Michigan State Law Review 1443.

¹⁶ The Maliki School, named after Abu Abd Allah Malik ibn Anas, exists primarily in countries in North Africa.

¹⁷ The Hanafi School, named after Abu Hanifa al Numan, dominates Afghanistan, Egypt, Pakistan and Turkey.

¹⁸ The Shafi School, named after Mohamed ibn Idhis al-Shafi, exists in Indonesia and in countries in East Africa.

¹⁹ The Hanbali School, named after Ahmad ibn Hanbal al Shaybani, exists in Saudi Arabia.

presumptive (unsure) but are *yakini* (confirmed).²⁰ This has been described in the Koran as 'This is the Book [the Koran] whereof there is no doubt.' (Sura Al-Baqarah, verse 2). It is this characteristic spirit of the Islamic law that makes it infinitely intellectual²¹ and impossible to alter or remove. However, *ijtihad* does allow for a demarcation between fixed and variable laws.²² Hence, *ijtihad* is the method that allows the generation of laws via the evaluation of information. This means that a Muslim scholar makes use of the Koran and the Sunnah to assist in reasoning, rather than devising his own laws. This is why Islamic law is considered to be impartial and unbiased. It is seen as being reliable and flexible rather than forceful and imposing, resulting in Muslim scholars claiming that 'God knows better' or stating 'but God alone really knows'.²³ When looking for Islamic solutions to issues like human trafficking, one must ponder upon the Koran, the Sunnah and *ijtihad*. The following sections will continue the exploration using this method only.

6.2.3 History of the Judiciary in the KSA

The rule in the KSA is based on the monarchy system, founded on Islam and stems from the principle of *Shura*.²⁴ The Holy Quran is the country's constitution, also the Islamic *Sharia* defines the nature of the restrictions imposed on the powers of the King, the Crown Prince and his aides.²⁵ The principle system of rule in Saudi Arabia was adopted in 1992 and is derived from the Koran and the virtuous *Sunnah* of the Prophet (PBUH).

²⁰ Salah-Eldin Abdel-Wahab, 'Meaning and Structure of Law' (1962-1963) 16 Vand L Rev 115, 123.

²¹ Ali Khan, 'Islam as Intellectual Property, "My Lord, increase me in knowledge"' (2000-2001) 31 Cumberland Law Review 361.

²² An example of *Ijtihad* is the postponement of the policy of annulling one's hand for attempting theft that came into being during the reign of the second caliph, Umar ibn Al Khattab, in spite of the original Koranic rule stating this order.

²³ Ziba Mir-Hosseini, 'How the Door of *ijtihad* was Opened and Closed: A Comparative Analysis of Recent Family Law Reforms in Iran and Morocco' (2007) 64 Washington and Lee Law Review 1499.

²⁴ Shura Council Law, art 17: 'The shura council's resolutions shall be submitted to the king who decides what resolutions to be referred to Cabinet. - If views of both the Shura Council and the Cabinet agree, the resolutions are issued after the king approval. - If views of both councils vary, the issue shall be returned back to the Shura Council to decide whatever it deems appropriate, and send the new resolution to the king who takes the final decisions.'

²⁵ Royal Decrees are the orders and directives issued by the king or his representative, after presenting them to the Council of Ministers and the *Shura* Council, and become applicable and official.

The Islamic *Sharia* is the main source of Saudi law and is complemented by regulations and orders issued by gracious royal decrees.²⁶

Article 26 of the Saudi constitution provides that the state²⁷ 'protects human rights in accordance with the *Sharia*'. The Council of Ministers combines legislative and executive powers and is responsible for drawing up domestic, foreign, financial, economic, educational, and defence policy and for all the public affairs of the state. International treaties and agreements become effective only after approval by the Council of Ministers. In this way Saudi Arabia would more closely follow the approach of the dualist legal systems of other countries when it comes to legal relationship between international and domestic law. Saudi rule derives its authority from Islamic *Sharia* and is based on justice, consultation and equality. In addition to the 'Shura Council' there is a 'Council of Ministers' which consists of scholars, experts and specialists. One of its most important terms of reference is discussing the general growth plan and studying rules and regulations, international treaties and agreements and privileges. Decisions of the Shura Council are sent to the Cabinet, and if the two councils' views converge, then they are issued after approval by the King, but if the two points of view differ then the King endorses the one he sees fit.²⁸

The judiciary authority is independent²⁹ in the Kingdom under the law on the organization of the judiciary for the year 1975.³⁰ The Saudi judicial system is subdivided into two main divisions, namely, general judiciary and administrative judiciary. The Ministry of Justice oversees the financial and administrative aspects of the general

²⁶ Royal Decrees are the orders and directives issued by the king or his representative, after presenting them to the Council of Ministers and the *Shura* Council, and become applicable and official.

²⁷ Kingdom of Saudi Arabia, Experts Commission in the Council of Ministers, official translation section <<http://boe.gov.sa/LawsTargma.aspx?lang=en>http://www.constitutionnet.org/files/constitution_of_saudi_arabia-1992.pdf> accessed 23 September 2013.

²⁸ Shura Council Law, art 2.

²⁹ What is meant by independence of the judiciary is to ensure that the judge does not fall under the influence of an authority or a person who prevents him from fulfilling justice in cases he is considering.

³⁰ Kingdom of Saudi Arabia, Ministry of Justice, - electronic portal - judiciary system in English <<http://www.moj.gov.sa/ar-sa/Pages/Default.aspx>> accessed 24 September 2013.

judiciary, but the general judicial side is subject to supervision by the Supreme Judicial Council.³¹

The KSA adopted Islamic law as its operating system, with the provisions and principles of Islamic law being the basis for all its rules and regulations. Litigation bodies in the Kingdom are numerous within the judicial system, they act in accordance with Islamic jurisprudence warranties and with guarantees provided by applicable regulations, to address cases brought before the courts.

The fundamental system of rule, issued by the gracious Royal Decree No A/90 on 27/8/1412 AH, provides that the different types and levels of courts adjudicate over all disputes and crimes.³² In adherence to these gracious steps, and in order to overcome the obstacles facing judges and litigants in the Kingdom, the judiciary system No M/64 dated 14/07/1395 AH³³ was repealed, and a new system initiative was launched to keep pace with modern systems in most countries, and to achieve sustainable growth in the Ministry of Justice, on all stages and at all levels, by Royal Decree No M/78 dated 19/9/1428 AH (2007). Some amendments were made to the provisions of the repealed system and some articles were introduced in order to facilitate litigation procedures and speed up the resolution of disputes.³⁴ In this way, the most important features of the new judicial system are expressed in the multiplicity of general judiciary courts and their diversity within the state judicial system, whereby the courts of ordinary judiciary and their organization were re-structured and divided into three types, with the Supreme Court being the highest, followed by the Courts of Cassation in the middle, and the Courts of First Instance at the base of the judicial body.

³¹ According to Royal Decree No (M/78) s 4 ch 1, there are five conditions for the choice of Judge in Saudi Arabia: The applicant must be a Saudi national, be of good conduct and behaviour, be fully qualified, hold a Sharia degree (Islamic Law), and not have any criminal convictions.

³² Ministry of Justice, 'New Organizational Structure of Courts: New Composition of the General Judiciary Courts' issued by Royal Decree No M/78 on 19/9/1428 <<http://www.moj.gov.sa/ar-sa/Courts/Pages/StructureCourts.aspx>> accessed 19 September 2013.

³³ Ministry of Justice, Judicial Systems, Royal Decree No M/64 on 14 Rajab 1395 (23 July 1975) approving the issuance of the judiciary system <http://www.moj.gov.sa/ar-sa/Pages/judgment_systems.aspx> accessed 19 September 2013.

³⁴ Ministry of Justice (n 32).

6.2.3.1 The Supreme Court

It is a single court, according to the judicial system in the KSA, based in Riyadh. Its goal is to monitor the correct application of Islamic Sharia law and to make sure that regulations issued by the authorities are not inconsistent with it, in cases that fall within the jurisdiction of the general judiciary.

5.2.3.2 The Courts of Cassation

According to the judicial system there is one or more court of cassation in every region of the Kingdom.³⁵ These courts – the so-called ‘second-level courts’ – consider judgments of the courts of first instance located within their jurisdiction and are subject to appeal.

6.2.3.3 The Courts of First Instance³⁶

According to the judicial system, the courts of first instance are spread in all the provinces and regions of the Kingdom. These courts have jurisdiction over hearing and sentencing in all cases that fall within their spatial and qualitative area of competence.

Some judgments issued by them are subject to appeal Supreme Court,³⁷ In particular those with the most difficult legal problems, and those involving corporal punishment or execution. Given the diversity of cases that come within the courts of first instance jurisdiction, article 9 of the judicial system has re-arranged and re-structured them, and divided into five types,³⁸ namely, General Courts. They are spread in all the provinces and regions of the Kingdom.

The General Courts in the regions consist of specialized circuits, including circuits for implementation, final proofs and the like –which fall beyond the terms of reference of

³⁵ The country is divided into 13 Regions.

³⁶ Ministry of Justice, ‘Electronic portal’ <<http://www.moj.gov.sa/ar-sa/Courts/Pages/StructureCourts.aspx>> accessed 19 September 2013

³⁷ Ministry of Justice (n 32).

³⁸ According to the recent amendment issued by Royal Decree No M/78 on 19/9/1428.

other courts and notaries – and to rule in lawsuits arising from traffic accidents and violations set out in the traffic system and its implementing regulations.

General Courts: They consist of a single or three judges, as determined by the Supreme Judicial Council.³⁹ Verdicts in the General Courts are issued by a single judge except verdicts in cases of murder, or punishments which require stoning, cutting and other issues determined by the system, which are issued by three judges. The General Courts shall hear all cases, final proofs and the like that fall beyond the jurisdiction of other courts, notaries and the ombudsman office.

Criminal Courts: They are spread in various governorates and regions of the Kingdom. The Criminal Courts are composed of specialized circuits (circuits of cases of retribution and doctrinal provisions – circuits of punitive chastisement cases – circuits of juvenile cases).⁴⁰ Each circuit of the Criminal Courts consists of three judges, with the exception of cases determined by the Supreme Judicial Council which are to be heard by a single judge.

Their jurisdiction: The Criminal Courts have jurisdiction to rule in all criminal cases, also in all matters on which judgment in criminal cases brought before it depends on it.

Personal Affairs Courts: They are also spread in the various governorates and regions of the Kingdom. They consist of one circuit or more, each circuit consists of one judge or more, as determined by the Supreme Judicial Council.⁴¹ They may also consist of specialized circuits, as may be necessary. The personal affairs courts are competent to consider all matters of personal affairs such as proofs of marriage, divorce, divorce for consideration, annulment of marriage, remarriage with divorced wife, custody, alimony and other lawsuits arising in matters of personal affairs.

Labour Courts: They are spread in various governorates and regions of the Kingdom. The labour courts are composed of specialized circuits, and each circuit consists of a

³⁹ Provisions of articles 21, 22 and 23 of the new judiciary system issued by Royal Decree No M/78 on 19/09/1428 AH (2007) <<http://www.moj.gov.sa/ar-sa/Courts/Pages/StructureCourts.aspx>> accessed 24 September 2013.

⁴⁰ *ibid.*

⁴¹ *ibid.*

single judge or more, as determined by the Supreme Judicial Council.⁴² This affirms the keenness of the KSA to protect workers' rights which guarantee for them living in dignity and security away from injustice and coercion. Labour courts have jurisdiction in the following areas:

1. Disputes relating to employment contracts, wages, rights, work-related injuries and compensation.
2. Disputes relating to the employer's exercise of disciplinary actions on the worker, or relating to requests for exemption from them.
3. Lawsuits filed for exercising the penalties provided for in the labour system.
4. Disputes arising from termination of employment.
5. Complaints of employers and workers whose objections against decisions were not accepted, issued by any competent body in the general authority for social security, relating to compulsory registration, contributions or compensation.
6. Disputes relating to workers subject to the provisions of the employment system, including government employees.
7. Disputes arising from the application of the employment and social security system, without prejudice to the powers of other courts and the ombudsman office.⁴³

Commercial Courts: They are spread in the various governorates and regions of the Kingdom. Commercial courts are composed of specialized circuits, and each circuit consists of a single judge or more, as determined by the Supreme Judicial Council. Commercial courts have jurisdiction in all original commercial disputes, and over those related thereto, that arise between merchants, as well as in all other commercial disputes.⁴⁴ The new system confirmed the principle of necessary unification of the various courts of the judiciary in the application of legal and system rules, which was

⁴² *ibid.*

⁴³ *ibid.*

⁴⁴ *ibid.*

the case in the former system. The application of this principle is achieved by the presence of the highest court at the apex of the judicial pyramid which supervises the courts' correct application of legal and system rules effective in the Kingdom. This is called the Supreme Court, in the Kingdom.

6.2.4 Classification of Crimes in the KSA according to the Islamic Legal System

The most thorough line of attack when handling the issue of human trafficking is to consider it a potential threat and to subject those involved to proper punishment. Therefore, it is fundamental to establish whether or not the laws of Islam allow for handling of such cases of human trafficking.

Islam offers a greater degree of flexibility than other systems. In the positive legal system, civil behaviour is regarded as being either legal or illegal; however, these acts under Islamic law are characterized depending on their level of extremity. Compulsory actions, also called *Fard* or *Wajub*, such as saying the five prayers or observing fasts during Ramadan, always have to be performed. Then there are some acts which are not permitted in Islam. These are called *Haram*, and include such actions as consuming pork or alcohol. Some actions are called *Makruh*; these are disliked but are not sinful, and therefore are not liable to punishment. For example, getting divorced is considered the most culpable act in the sight of God and is *Makruh*. Other actions are *Halal*, and this is considered to be the fundamental code of Islamic law.⁴⁵ Indifference to, not taking action against or not compensating the victims of human trafficking is classified as *Haram*.

6.2.5 Hudud, Ta'zir and Qisas Crimes under the Islamic Legal System

The law of Islam has three classifications of criminal offences. These are *hudud*, *ta'zir* and *qisas*, according to the words of the Koran and the Sunnah. There are also three

⁴⁵ Abdel-Wahab (n 20) 119.

critical differences between rights: God's (divine) rights, individual rights and mixed rights.⁴⁶

The *hudud* crimes are resolved in texts, and include stealing, fornication, adultery, false blame for sexual intercourse, use of alcohol, revolts, corruption and the renunciation of religion, all of which are considered criminal offences against the entity. *Ta'zir* crimes are those that cause harm to the general public or to a nation's credibility, the punishment of which is in the hands of the ruler and the human trafficking is case of *Ta'zir*.⁴⁷ *Qisas*⁴⁸ are crimes against people, such as murder, which require revenge (*qisas*) or monetary reimbursement (*diya*). All legal systems declare some actions as being prohibited and suggest punishments for them.

Ta'zir allows for the punishment of *Hadud* crimes, or criminal offences against other people, but a verdict cannot be passed for suitable punishments. The punishments present in Islamic laws are harsh, but are formulated to promote a deterrent and the prevention of the further spread of these crimes by the same or other offenders. Death is the punishment for highway robbery, apostasy, adultery and rebellion. This severity is in order to prevent these crimes from being performed by others. The Koran says 'the law of fair retribution is a source of life [by adhering to it, you may be restrained from desiring the death of those who murder and instead be content with compensation]. This point we clarify so that you may fear God (and exercise caution when seeking revenge)' (2:179).⁴⁹

The laws of Islam guard victims' rights to the fullest. They also guard the rights of the person being accused by making sure that the accusation is not false, requiring the

⁴⁶ AZ Bakr, *Hudud, Ta'zir for Ibn Qayyim: A Balancing Study* (2nd edn, Higher Judicial Institute in Riyadh 1995).

⁴⁷ *Ta'zir* crimes are those acts that endanger public order or state security, which is not mentioned in the Koran directly and the crime is left to the discretion of the ruler.

⁴⁸ Hossein Esmaeili and Jeremy Gansast, 'Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials' (2000) 28 *Denver Journal of International Law and Policy* 145.

⁴⁹ The concept of *tawba*, or repentance, is the act of forgiveness for one's wrongdoing after acknowledgement of the harm or injury caused to others or to oneself. The Koran, 39:53, states: 'Say [O Muhammad]: "O my people who have been excessive against yourselves, do not despair of God's mercy ... surely God will forgive sins altogether, surely He is the All-forgiving, the All-compassionate. Turn unto your lord and submit to Him, before the chastisement comes upon you [for then it will be too late and] you will not be helped".'

presence of proof and evidence, employing cross-examination, and guaranteeing the right to appeal and to seek legal assistance. The Prophet (PBUH) warned that those who cause trouble to people in this world will have to suffer accordingly in the world hereafter. The rights accorded to the accused are based on the 'protected interests' of all human beings as per their Sharia human rights, freedoms of thought, speech and belief, property rights etc. It is therefore important to ensure that punishment is only given to one who is genuinely guilty. This is why Islamic law demands solid rather than circumstantial evidence. One way of offering proof is the verdict of an eye witness. For instance, in the case of adultery, or *Zina*, the Koran demands the word of four eye witnesses who have seen the actual intercourse take place.⁵⁰

Ta'zir is an illicit behaviour; the punishment of which is not mentioned in the Koran or the Sunnah, and is therefore allowed to be set by the ruler. A *ta'zir* poses a threat to one or more of the following notions: the practice of religion, expansion of the mind, and the rights to reproduction, personal security and owning wealth and property for both men and women. It also applies to cases that are prohibited in the Koran or the Sunnah, or are against the well-being of a society, but are not liable to *hudud* or *qisas*. It is also applicable for crimes that do not exactly fall under the category of *hudud* or *qisas*, such as theft of a non-valuable item, and for crimes that are generally punishable by *hudud*, but owing to the absence of evidence are tackled with *ta'zir*.⁵¹

Intentional murder is the only case that draws the attention of *qisas*-oriented punishment. Nevertheless, authority over the entitlement of *qisas* is exclusive to the victim's family. The role of a judge in this punishment is restricted to the handing down of a death penalty sentence. The victim or his/her heir can decide whether to demand a death penalty, attain financial support or an excuse. Islamic laws promote both 'retributive justice' and 'restorative justice'. The latter requires the offender to compensate for the crime committed. Basically, therefore, Islam provides a possible substitute for the death penalty; this form of compensation is referred to as blood money.

⁵⁰ Bakr (n 46) 160. Four witnesses must simultaneously see, by their own eyes, the man's sexual organ inserted in the woman's sexual organ. The witnesses are required to be: of sound mind, Muslim, adult, fair, brave, and without a criminal record.

⁵¹ Bakr (n 46) 465.

6.2.6 Trafficking in Human Beings as an Example of the *Ta'zir* Crime under Islamic Law

Given the fact that the Koran and the Sunnah do not provide a very clear specification of the area in which human trafficking needs to be placed, it may be considered a *ta'zir* crime, and it is therefore up to the authorities involved to declare a punishment according to the extent and nature of the offence committed. This crime without doubt violates the idea of an individual's security, which is one of the fundamental requirements of Islam,⁵² which in KSA would cover all individuals in KSA, regardless of citizenship or religion. This shows that trafficking is a threat both to people and to the internal security of KSA. This is why this crime is different, and more serious, from people smuggling and drug trafficking, which are also regarded as *ta'zir* crimes according to the laws of Islam.⁵³

Islamic law therefore offers a wide and complete basis from which to discourage actions such as the trafficking of people, as well as the exploitative reasons for such trafficking. As this crime has religious limitations on it, Muslim countries are bound to establish rules against it. These rules need to, for different reasons, accord with both Islamic and international laws.

The fact that the crime of human trafficking is covered by Islamic laws is demonstrated by the fact that many Muslim nations strongly condemn and have legislated for this crime.

In the following chapter, a number of concepts and policies are described in detail; these are considered the best methods available to be adopted by Muslim countries that still do not have proper laws against human trafficking or for safeguarding the rights of such victims. Certain Muslim countries address the crime of human trafficking from the perspective of Islam. An example is the approach of Saudi Arabia in its

⁵² It may be argued that organized trafficking may entail elements of the crimes of corruption in property or street robbery.

⁵³ Bakr (n 46) 483.

statement to the Committee on the Rights of the Child under articles 34–36 of the Convention on the Rights of the Child.⁵⁴

According to the CRC,⁵⁵ it is forbidden to kidnap or sell children and use them for one's own personal interests. Anybody who gets involved in any such activity is liable to the punishment set up by the Criminal Code, which is compatible with the laws of Islam. Islam is against murder, unfair and forced actions, prostitution and any kind of deprivation. It makes sure that such offences are handled fairly and that people of all ages, religions and beliefs, and both genders, are provided with the same kind of protection, help and security.⁵⁶ This shows that the Islamic principles serve for the fundamental rules of condemning human trafficking, and these principles need to be implemented as comprehensively and honestly as possible.

The current global rules on human rights being acted upon in Muslim countries relate to the issue of trafficking in people very overtly, and with an approach that is pretty much based on Islamic principles. For instance, according to article 13 of the Cairo Declaration on Human Rights in Islam of 1990 (CDHRI), one must not be expected to carry out a task that he or she is unable to accomplish.

Furthermore, as prostitution is an act that is not permitted in Islam, not only is trafficking to gain this advantage from others prohibited, but trafficking for prostitution is also forbidden according to the Arab Charter on Human Rights 2004 (ACHR)⁵⁷ which has been adopted by the member countries of Arab League including Saudi Arabia. At regional level, Saudi Arabia is also part of the LAS (the Arab League) formed in 1945 having 22 member states. In 2004, the Arab League promulgated 'Arab

⁵⁴ The KSA (p 51) states: According to the Convention on the Rights of the Child: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:
(a) The inducement or coercion of a child to engage in any unlawful sexual activity;
(b) The exploitative use of children in prostitution or other unlawful sexual practices;
(c) The exploitative use of children in pornographic performances and materials. States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form (art 35). States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child's welfare (art 36).

⁵⁵ CRC, art 35.

⁵⁶ League of Arab States, Arab Charter on Human Rights <<http://www1.umn.edu/humanrts/arab/a003-2.html>> accessed 24 June 2013; see generally Mervat Rishmawi, 'The Revised Arab Charter on Human Rights: A Step Forward?' (2005) 5 Human Rights Law Review 361.

⁵⁷ *ibid.*

Charter on Human Rights' that came into effect in 2008. Articles 9 and 10 expressly deal with trafficking and slavery issues.

This issue is addressed in article 10 ACHR, which states that it is not allowed to indulge in the act of trafficking for the sake of taking advantage of other people, and it is also prohibited to smuggle a person for acts of prostitution and other related forms of abuse.

Precisely speaking, according to article 10 of the ACHR:⁵⁸

- a. Any kind of human trafficking and slavery is not permitted and is therefore subject to punishment. It is absolutely forbidden to withhold people as slaves for personal benefits.
- b. Human trafficking for the sake of sexual advantages and prostitution, forced labour, taking advantage of other people's prostitution or any related kind exploitation, is strictly discouraged.

Moreover, this charter also discourages trafficking in human organs, stating in article 9:

No one shall be subjected to medical or scientific experimentation or to the use of his organs without his free consent and full awareness of the consequences and provided that ethical, humanitarian and professional rules are followed and medical procedures are observed to ensure his personal safety pursuant to the relevant domestic laws in force in each State party. Trafficking in human organs is prohibited in all circumstances.

Thus the Arab countries that approved this charter need to keep a check on all these types of human trafficking in their countries.⁵⁹

As a result, the synchronization of the Islamic policies in opposition to human trafficking is demonstrated by the establishment of national rules and regulations

⁵⁸ *ibid.*

⁵⁹ The revised Arab Charter on Human Rights states in art 48: 'The States parties undertake to submit reports to the Secretary-General of the League of Arab States on the measures they have taken to give effect to the rights and freedoms recognized in this Charter and on the progress made towards the enjoyment thereof.' See also Mohamed Y Mattar, 'Comparative Models of Reporting Mechanisms on the Status of Trafficking in Human Beings' (2008) 41 Vanderbilt Journal of Transnational Law 1355.

against human trafficking in many Muslim countries, as most of these ask for conformity between national laws and those of Islam. In 2009, Saudi Arabia banned human trafficking by declaring it a crime, and advised compensations to the victims together with making efforts towards the abolishment of the crime.⁶⁰

6.3 THE VOLUME OF TRAFFICKING IN THE KSA

6.3.1 Assessing the Statistics of Human Trafficking

The KSA is labelled as the destination state for all the victims of human trafficking who are trafficked in the Middle East, Central and Southeast Asia.⁶¹ In the 2015 report *Trafficking in Persons*, the US Department of State ranked the KSA as being a 'Tier 2 watch list' which made some progress to prosecute criminals and protect victims.⁶² Tier 2 watch list countries are regarded as those that are 'destination countries for men and women subjected to forced labour and, to a lesser extent, forced prostitution'.⁶³ While the KSA demonstrated some improved law enforcement efforts, it failed to address non-payment of wages and withholding of documents, which are clear indicators of potential forced labour. According to the report, the KSA is among those countries that hires the largest number of immigrants into 'domestic work'.⁶⁴ Given the fact that the majority of the immigrants have minimal skills, they are vulnerable to being forced into servitude, deprived of wages, and made to work for up to 15 hours every day. They can be abused both sexually and physically, and are often not permitted to travel as their legal documents are withheld by the '*Kafeel*' or sponsor. Moreover, the conditions in which many of these domestic workers are made to work evidently promote forced labour, debt bondage, and forced prostitution. Also, it is mandatory for the immigrants to obtain an exit visa before moving, and this is not

⁶⁰ Royal Decree No M/40 of 2009 (Law for Combating Crimes of Trafficking in Persons), Um Al-Quaran, (2009) art 2 (Saudi Arabia) <www.protectionproject.org/wp-content/uploads/2010/09/Saudi-Arabia_TIP-Law_2009_Com_bined.pdf> accessed 24 October 2012.

⁶¹ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2015).

⁶² *ibid.*

⁶³ *ibid.*

⁶⁴ Ray Jureidini, 'Trafficking and Contract Migrant Workers in the Middle East' (2010) 48(4) *International Migration* 142-163.

easy to obtain without their employer's permission. Consequently these immigrants end up working for a period far beyond their original tenure.

According to the Trafficking in Persons Report, forced labour in the form of street vending and begging are the prime problems faced by the KSA.⁶⁵ This is a clear violation of human and child rights as per the international trafficking laws. Also, it is noteworthy that domestic workers in the KSA are most susceptible to 'forced labour or compulsory work'.⁶⁶ This issue is worsened by the fact that these workers are not protected by the general labour law of the KSA.⁶⁷ Recently, the KSA has been placed in the category of states where 'the governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards'.⁶⁸

The 2005 Saudi Labour Law is applied in cases where an individual is employed to work under contracts of apprenticeship, in the government, in charitable organizations, and public agencies. This means that the provisions of the 2005 Saudi Labour Law are not applicable to those working in family enterprises that comprise only members of the family of employers, domestic servants, and agriculture workers. Also, the Law clarifies the issue of foreign employment, wage protection, labour contracts, workers' duties, and working hours, but does not deal enough with the matters of forced labour, slavery, and compulsory labour.⁶⁹ The efforts made by the government to counteract this issue were evident in the KSA's Trafficking Law 2009, which is criminal law.

According to the reports of several international NGOs, there are a huge number of male, female and child forced labourers in the KSA.⁷⁰ Approximately 400,000 foreign workers were deported from the KSA by the government by November 2013.⁷¹ Among these workers were many trafficked victims. International statistics have been used to reach this conclusion because the Government of the KSA lacks its own statistical

⁶⁵ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2013).

⁶⁶ Bina Fernandez, 'Cheap and Disposable? The Impact of the Global Economic Crisis on the Migration of Ethiopian Women Domestic Workers to the Gulf' (2010) 18(2) *Gender & Development* 249-262.

⁶⁷ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2013).

⁶⁸ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2015).

⁶⁹ Kingdom of Saudi Arabia, Saudi Labour Law: Royal Decree No M/51 (2005) <<http://portal.mol.gov.sa/ar/Pages/OrganizeWork.aspx?m=3>> accessed 12 September 2013.

⁷⁰ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2014).

⁷¹ *ibid.*

records. Many were irregular immigrants who were trafficked or smuggled into the region, or were seen to travel independently and then remain in the KSA illegally. Notwithstanding the issuance of the KSA Trafficking Law in 2009, until 2015 no proper statistics existed on the number of convictions that took place during these years.

There has been a recent improvement in the reporting of human trafficking, with 11 cases recorded in 2011,⁷² and 52 cases and convicted 68 criminals in 2013, with 23 of those convicted of forced labour offences.⁷³ The situation in the KSA with regard to human trafficking for forced labour is beginning to emerge. In addition, according to the 2015 report *Trafficking in Persons*, the government reported its investigation of 725 trafficking suspects from April to December 2014, which is a marked improvement on previous periods.⁷⁴

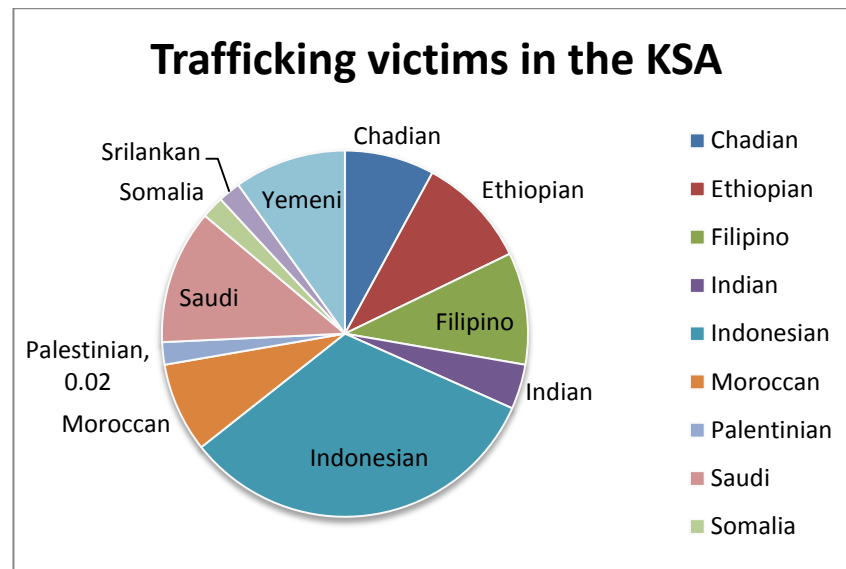


Figure 2 Trafficking victims in the KSA⁷⁵

The above pie chart shows the nationalities to which the victims of trafficking belong,⁷⁶ with the largest number belonging to Indonesia. Next in equal numbers are Filipino, Ethiopian, and Yemeni nationals. Next in equal number are Moroccan and Chadian

⁷² US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2012).

⁷³ National Committee to Combat Crimes of Trafficking in Persons of the KSA (NCCTP), 'NCCTP Strategic Plan' (NCCTP, 2012) <<http://nshr.org.sa/>> accessed 2 November 2014.

⁷⁴ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2015).

⁷⁵ Issued by the National Committee to Combat Crimes of Trafficking in Persons (NCCTP) in 2014.

⁷⁶ NCCTP (n 73).

nationals, followed by Indian nationals. Last are Sri Lankan, Somalian and Palestinian nationals.⁷⁷ Also worth noting is that Saudi nationals are also victims of human trafficking in their own country. In contrast to the UK, below, there is no analysis on the gender of the victims of human trafficking readily available.

The comparator jurisdiction used in this thesis, the UK also plays a role as a destination and transit state, analogous to the KSA. Details pertaining to the UK laws combating trafficking has been discussed in the previous chapter.⁷⁸ Indeed, the UK is among the most common destination states for the victims of trafficking, from Asian states such as China and Thailand, Eastern Europe, and West African states such as Liberia, Nigeria, and Sierra Leone.⁷⁹ Most victims are children and young women forced into labour and prostitution.⁸⁰ Statistical data pertaining to the degree of sexual and labour exploitation is still unavailable. However, the number of female immigrants in off-street prostitution in England and Wales is high (out of approximately 30,000 women, 17,000 are immigrants).⁸¹

6.3.2 Factors Leading to Human Trafficking

Factors such as economic trends, globalization, and increase in population serve as strong contributing factors to human trafficking for both countries, which eventually lead to sexual exploitation or forced labour.⁸² As discussed in Chapter 2, most fall victim to trafficking due to the low socio-economic and cultural setup to which they originally belong. Issues of family commitments, constant poverty, political imbalance,⁸³ and gender bias in the State to which they belong cause them to adopt irregular migration which contributes to human trafficking.⁸⁴ The purpose of this section is to explore these factors in detail and offer a comparative study of the UK and the KSA.

⁷⁷ *ibid.*

⁷⁸ See further Chapter 5.

⁷⁹ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2003).

⁸⁰ House of Commons, *Human Trafficking: Updated, Twenty-first Report of Session 2006-2007* (The Stationary Office 2007) para 2.

⁸¹ Association of Chief Police Officers, 'Setting the Record: The Trafficking of Migrant Women in the England and Wales Off-Street Prostitution Sector' (Project Acumen, London, August 2010) 10, 12.

⁸² John Winterdyk and Philip Reichel, 'Introduction to Special Issue: Human Trafficking - Issues and Perspectives European' (2010) 7(1) *Eur J of Criminology* 5, 6.

⁸³ Such as Syria and Yemen for Saudi Arabia.

⁸⁴ See further Chapter 2, section 2.2 above.

Constant poverty and failure to thrive financially constitute major factors of trafficking in the origin States. Trafficked victims flee their home country in search of better economic conditions. One example is Thailand, where an increased number (somewhere between 300,000 and 2.8 million)⁸⁵ of Thai nationals have been recorded to have migrated abroad.⁸⁶ Differences in financial status seen in the origin and destination states result in the trafficking of human beings, who are treated as commodities. This is also linked with illegal trade of ammunitions and drugs.⁸⁷ Studies reveal that this kind of trade ranks as the second most lucrative trade for organized crime seen in both the UK and the KSA.⁸⁸ Internationally, human trafficking is valued at between \$9 billion and \$31.6 billion per year. Fifty percent of this is made in the industrialized states.⁸⁹ Moreover, at the EU level, this trade earns approximately €2.5 billion per year, corresponding to the trafficking of nearly 140,000 victims.⁹⁰ Since the Soviet Union broke down, Western Europe and the States of the GCC (or 'the Gulf States') are being seen by traffickers as lucrative destination states. Financially stable countries such as the UK and the KSA are viewed as prospective states by both the traffickers and trafficking victims because of the attractive job opportunities offered by them,⁹¹ thereby labelling them as destination countries.

Furthermore, the increase in female trafficking has its roots in the prevalence of gender discrimination in the state of origin. There are several countries where women are not considered as important as men. Consequently, they are deprived of education and resources, and are forced to work domestically. Such a situation makes them vulnerable to exploitation.⁹² These females end up as victims of trafficking involved in

⁸⁵ IOM, 'Combating Trafficking in South-East Asia: A Review of Policy and Programme Responses' IOM Migration Research Series, 2/2000 (IOM 2000) 17.

⁸⁶ *ibid.*

⁸⁷ USA Congress, *Congressional Record, Proceeding and Debates of the 106th Congress, 2nd session, Vol 146, Part 15* (US Government Printing Office 2000) 21339.

⁸⁸ LaVerle B Berry and others, *Report on Nations Hospitable to Organized Crime and Terrorism* (Library of Congress - Federal Research Division 2003) 134.

⁸⁹ Patrick Belser, 'Forced Labour and Human Trafficking: Estimating the Profits' (2005) International Labour Organisation Working Paper WP.42, p 17.

⁹⁰ UNODC, *Report on Trafficking in Persons to Europe for Sexual Exploitation* (UNODC June 2010) 7.

⁹¹ John Morrison, *The Cost of Survival: The Trafficking of Refugees to the UK* (Refugee Council 1998) 24.

⁹² UNODC, *Toolkit to Combat Trafficking in Persons* (UNODC 2006) xvii.

domestic work, in both the UK and the KSA. They send their earnings to their families residing in their homeland, and many are the sole providers of these families.⁹³

Political instability and related issues also serve as contributing factors to trafficking. Individuals feel agitated and restless in their homelands, and this compels them to immigrate illegally to other states. As a result of this illegal migration, they become vulnerable to exploitation.

Even though there have been national and international attempts to combat this issue by both the UK and the KSA, failure to identify the individuals as being victims of the crime has limited the effectiveness of these efforts. This has also limited the ability of law enforcement to target the organized crime groups who are exploiting the victims. There is no fixed guideline for understanding the link between the financial, cultural, and social factors contributing to human trafficking.⁹⁴ Thus, all individuals are potentially susceptible to exploitation via trafficking.⁹⁵

6.3.3 The Distinctive Features of Human Trafficking

The factors that lead to each issue of human trafficking are unique in nature and include forced labour and sexual exploitation.⁹⁶ Similar factors are observed in human trafficking in the UK and the KSA. The National Committee to Combat Crimes of Trafficking in Persons (NCCTP)⁹⁷ and the Poppy Project in the UK⁹⁸ claimed that women face the same type of circumstances in all stages of trafficking that make them susceptible to exploitation. All of them experience sexual or physical abuse at some point in time. Many of these women also view themselves as being the breadwinners for their family, and are therefore coerced into migrating illegally for the sake of

⁹³ Min Liu, *Migration, Prostitution and Human Trafficking: The Voice of Chinese Women* (Transaction 2011) 187.

⁹⁴ Yvonne Rafferty, 'Children for Sale: Child Trafficking in Southeast Asia' (2007) 16(6) *Child Abuse Review* 401, 409.

⁹⁵ Laura Wirtz, 'Hidden Children: Separated Children at Risk' (2009) London Safeguarding Children Board Children Society Research Report 6 <<http://www.londonscb.gov.uk/trafficking/>> accessed 12 October 2013.

⁹⁶ See further Chapter 2, section 2.5 above.

⁹⁷ This came into being in 2009 (1430 AH) and ensures that the victims of trafficking are duly recognized, are kept in appropriate conditions and are not abused. It also manages communication links with other concerned agencies and helps in the repatriation of victims.

⁹⁸ Poppy Project, *Report on Routes In, Routes Out: Quantifying the Gendered Experience of Trafficking to the UK* (Poppy Project 2008) 6-15.

improving their family's living standards. The recruitment of women into the human trafficking supply chain at the stage of movement and transit shares similar characteristics. They are given false hopes of better employment prospects and improved pay scales, and are coerced or illicitly attracted by relatives or acquaintances to accept the offers being made to them.

The next characteristic, which is similar in the UK and the KSA, is the complexity of the routes. Traffickers either transit through different states such as the GCC or EU to avoid detection, or they can employ direct routes of travel. On the arrival of the victims in their destination state, their legal documents are withheld by their traffickers and their movements are also controlled by their traffickers. It is at this point that many victims realize the actual situation that they are in. The traffickers confiscate the documents on the grounds that they are illegal immigrants, and then threaten the victims that they will be arrested if they fail to comply with the traffickers demands. Thus, it is easy to control, misuse and exploit such victims who are in weak legal positions.

Another similarity seen between human trafficking in the UK and the KSA is labour and sexual exploitation. The victims face severe exploitation at the hands of their traffickers. Their movement is restricted, their wages are denied, and they are made to live and work in substandard conditions.⁹⁹

The vast majority of victims flee their homeland due to uncertain financial prospects. Unfortunately, upon arriving in their destination states, they fall victims to debt bondage in order to pay the costs of the process of trafficking. While some victims are aware of the fact that they will be required to pay a certain sum of money to their traffickers, most are unaware that the actual amount of travel and accommodation will be so high.¹⁰⁰ As a result, they have little choice but to work for their traffickers in order to clear the debt. This work costs them their psychological stability, due to long

⁹⁹ Paola Monzini, *Sex Traffic: Prostitution, Crime and Exploitation* (Zed Books 2005) 35-36.

¹⁰⁰ Kelly and Regan (n 83) 25.

working hours that are described as 'round the clock'.¹⁰¹ Also, physical mistreatment, mental torture, and the use of force and threat greatly affect their well-being.¹⁰²

Although some victims are aware of the fact that they are being moved via trafficking, they are unaware of the level of insecurity and risk that exists in their destination state. For instance, victims who willingly agreed to be trafficked for forced labour in the first place, realize only after reaching the destination state that they are unable to exercise control over the number of individuals they are forced to have sexual relations with. Thus they are exploited.

The facilitators involved in human trafficking play a crucial role in the process. Even though their profiles vary, it is commonly believed that they are interlinked. They are often the victims' friends, boyfriends, husbands, and relatives – people who are well known to the victims. Other than this structure, the network of traffickers is also highly structured and part of transitional and national criminal organization.¹⁰³ Both the UK¹⁰⁴ and the KSA¹⁰⁵ have strict laws on organized crime based on the Palermo Convention 2000.¹⁰⁶ The UN Trafficking Protocol focuses on transnational organized crime, and this is why both the UK and the KSA pay due regard to recognizing the various agencies involved in criminal activities.

In the following section, the researcher discusses the various important transnational organized crime groups that exist. A critical analysis of the efforts made to gauge and assess the recent KSA anti-trafficking legislation is also made in the following section. For the sake of better understanding, the UN Trafficking Protocol will be discussed in detail, with special emphasis on protecting the victims of trafficking as prescribed by the national legislation.

¹⁰¹ ILO, 'Working Hours in Domestic Work, Policy Brief No 2 (2011) Conditions of Work and Employment Branch (TRAVAIL) 6 <http://www.ilo.org/travail/whatwedo/publications/WCMS_156070/lang--en/index.htm> accessed 12 December 2013.

¹⁰² Monzini (n 99) 44.

¹⁰³ Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff 2006) 46-47.

¹⁰⁴ Currently the Serious and Organised Crime Police Act 2005, which applies to the whole of the UK.

¹⁰⁵ Law of Criminal Procedure Royal Decree No M/39 (16 October 2001).

¹⁰⁶ United Nations Convention against Transnational Organized Crime 2000.

6.4 NATIONAL EFFORTS AGAINST HUMAN TRAFFICKING IN THE KSA

6.4.1 Human Trafficking and Related Legislation

It was stated above that the KSA is seen by many as a destination state. Moreover, it is also becoming a transit state for the purpose of human trafficking. There are several legislative instruments in place to combat this crime in the KSA and it is working with the international community. Examples are the UN TOC Convention (approved in the KSA on 18 January 2005¹⁰⁷) and the UN Trafficking Protocol (approved in the KSA on 20 July 2007¹⁰⁸). However, the most important national legislation is the 2009 Saudi Trafficking Law, which directly deals with the issue of trafficking.¹⁰⁹ The Law came into existence as a result of national efforts to overcome human trafficking as a crime.

Before examining this Law in detail, it will be useful to understand the anti-trafficking law that existed in the region before the Law came into existence in 2009.

One such law is the 1991 Basic Law of Governance (BLG).¹¹⁰ It prohibits human trafficking committed for the purpose of forced labour and slavery.¹¹¹ It was released by the KSA and contains several provisions related to the rights of foreign and national residents. Some of the articles of the Law, particularly article 26, emphasize the need to combat human trafficking as crime: 'The State shall protect human rights in accordance with the Islamic Shari'a'.¹¹² Further, article 28 states: 'The State shall facilitate the provision of employment opportunities for every person capable of

¹⁰⁷ UNODC, 'Signatories to the United Nations Convention against Transnational Crime and its Protocols' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en> accessed 16 November 2014.

¹⁰⁸ UN Trafficking Protocol, 'Signatories to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12-a&chapter=18&lang=en> accessed 16 November 2014.

¹⁰⁹ In conjunction with the Law of Criminal Procedure Royal Decree No M/39 (16 Oct 2001), according to BLG, art 49.

¹¹⁰ The 1991 Basic Law of Governance is the Saudi charter which is divided into nine chapters and 83 articles issued by King Fahd pursuant to Royal Decree No A/90.

¹¹¹ BLG <<http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=4&VersionID=240>> accessed 9 June 2014.

¹¹² *ibid.*

working and shall enact laws to protect workers and employers'.¹¹³ Moreover, the KSA is amongst those States who have taken up several international agreements on slavery and related crimes, as discussed in Chapter 1.¹¹⁴ Thus, any person involved in bringing an individual into the KSA, or assisting their exit, for the purpose of forced labour or slavery shall be punishable as per the BLG.¹¹⁵ Notwithstanding these provisions, the researcher believes that there is a need to include detailed provisions related to forced labour in the 2009 Saudi Trafficking Law, due to the increase in the incidence of this crime, and the particular way in which this crime occurs in practice.

Furthermore, another legislative instrument is the KSA's 1974 Border Security Law,¹¹⁶ which deals with the issue of transport in terms of trafficking or smuggling.¹¹⁷ This Act provides for the controls of the border so as to limit these activities. The entry of any individual without regular documents¹¹⁸ is prohibited under this Law, and in accordance with the UN Smuggling Protocol.¹¹⁹ This also serves as a protective measure for the victims of trafficking who are later exploited by their traffickers who have knowledge regarding irregular entry. The victims are usually exploited because of their lack of knowledge regarding their status and the system.¹²⁰

A commonly known fact is that the KSA is a prime location for trafficking because of its economic and religious importance. It has seen rapid progress in recent years in the Middle East and is considered a wealthy state, especially by those states that face economic and political instability such as in Syria and Yemen. Thus, it is a common to see people from these countries attempting to enter the KSA illegally via land or sea.

¹¹³ *ibid.*

¹¹⁴ See further Chapter 1.

¹¹⁵ BLG (n 111).

¹¹⁶ Saudi Border Security Act

<<http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=226&VersionID=30>> accessed 12 June 2014.

¹¹⁷ See section 3.3 above regarding the differences between human trafficking and smuggling of migrants.

¹¹⁸ Border Security Law, s 7 specifies offences that are penalized including secret entry, human trafficking, and smuggling within the Kingdom's territory, especially of women and children.

¹¹⁹ UN Smuggling Protocol, art 6(1)(b). The term 'illegal entry' means: 'Crossing borders without complying with the necessary requirements for legal entry into the receiving State' - UN Smuggling Protocol, art 3(b).

¹²⁰ At the same time, the Smuggling Protocol, art 5 prevents the criminalization of migrants for having been the victims of criminal offences.

Despite the fact that in the past the KSA has permitted the entry of a number of immigrants, it has now started to implement strict immigration policies. In recent years, it has been the aim of the KSA Government to increase local participation in the Kingdom and reduce the influx of migrants, thereby reducing the KSA's dependence on foreign workers by increasing the quota for Saudi nationals in the employment sector.¹²¹

An important point to mention here is that according to the United Nations World Migration Report, in the last 20 years, the KSA has also experienced a large efflux of international migration. In 1990, 4,743,000 people moved internationally, representing 29% of the whole Saudi Arabian population. After the 1990s, the figure increased to 5,163,000 in 2000. In 2013, this figure was seen to have risen to 9,723,000. There is a lack of a detailed analysis of these figures available. In between 1990 and 2013, the percentage of international immigrants remained at between 24.7% and 27.8%. There is a possibility that these migrations might actually be cases of deportation of individuals who were previously trafficked into the KSA.¹²²

According to the researcher, all the legislation attempts is to prevent the illegal entry of individuals into the state, with its focus more on protecting the sovereignty of the State than identifying the purpose behind the migration into the country. Also, using the term 'illegal' to describe entry renders all sorts of entries illegal, without any requirement to consider the motive for such entries. Alternatively, using the term 'irregular' to describe migration is more likely to open up debates as to the purpose of the entry of the individual into the region. Undoubtedly, not every person entering into the state is committing an offence; it is necessary to evaluate the reasons behind the entry.

The 2005 Saudi Labour Law¹²³ governs civil cases pertaining to the workers' contracts, as well as cases that are criminal in nature, such as forced labour. Adequate protection is not provided under the civil law. This clearly shows that the legal authorities still do not fully understand the crime of human trafficking and its implications, despite it

¹²¹ Saudi Labour Law: Royal Decree No M/51 (n 69).

¹²² US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2014).

¹²³ Saudi Labour Law: Royal Decree No M/51 (n 69).

being criminalized under the 2009 Saudi Trafficking Law. An important aspect to consider here is the trafficked workers who work as domestic workers or construction site workers, and who are not covered by the 2005 Saudi Labour Law. As a result, the KSA is greatly criticized over its failure to provide protection to such workers under the UN Trafficking Protocol,¹²⁴ by the 2005 Saudi Labour Law, as mentioned below. Therefore, the researcher believes that there is a need to revise the 2005 Saudi Labour Law.

There is a need to study the cases of forced labour under the 2005 Saudi Labour Law, even in cases when the link between the employee and employer is otherwise legal. This is because many legal cases are brought before the court, but on deeper analysis it is revealed that various extreme forms of coercion and force, such as slavery, have been used in these cases. It is the responsibility of the Ministry of Labour (MOL) to refer these cases to the concerned investigating agencies,¹²⁵ particularly when it is possible that forced labour is involved.

Another matter requiring consideration by the 2005 Saudi Labour Law is that of *Kafala*, or sponsorship. *Kafala* has now become an unfair, non-transferable visa system. In this system, an employee is only permitted to work under their sponsor, and nowhere else or for no one else. This serves as a trap for foreign employees and has been described as 'contract slavery' by Bales.¹²⁶ When these employees attempt to leave their jobs as a result of abuse, they are often arrested for having violated the terms and conditions of their contract under the *Kafala* laws. The researcher agrees with Bales and also believes that any situation where an employee who loses the right to decide the nature, kind, and location of his or her work shall be regarded as slavery, which is an illegal act of employment. Moreover, domestic workers are also not protected under the 2005 Saudi Labour Law.¹²⁷ The researcher believes that failure to separate

¹²⁴ See further section 5.4.2 below.

¹²⁵ 2009 KSA Trafficking Law, art 16: 'Investigation and Prosecution Commission is the authority that carries out prosecution and investigation in crimes of human trafficking. It is also the authority responsible for searching places of accommodating of victims to ensure executing judicial penalties in this regard.'

¹²⁶ Kevin Bales, *New Slavery: A Reference Handbook* (2nd ABC-CLIO Inc 2004) 121.

¹²⁷ In recent years, Saudi Arabia has issued legislation governing the treatment of domestic servants. A list of domestic workers and their equivalents in Saudi Arabia was issued on 15 July 2013: Ministry of Labour, 'A List of Domestic Workers and their Equivalents in Saudi Arabia' (2013)

domestic workers from trafficked victims by the legislation of the KSA is a common error seen in the system. For instance, workers from Indonesia and Philippines are being moved into the KSA willingly, in search of employment opportunities. However, it is only after arriving in the state that they realize that the conditions and nature of work is not what they were led to believe. Moreover, they are often forced by their employers to work against their choice, such as by making them work at their homes, by restricting their movements, by confiscating their legal documents and withholding their wages, and in more extreme cases by abusing them sexually and physically.¹²⁸ There is often a mistake seen in the identification of sponsorship laws for these workers by the General Directorate of Residency and Foreigners' Affairs which holds the right to manage, supervise, and enforce sanctions. On the other hand, females generally accept domestic work due to the fact that they are required to pay their debt in addition to the absence of high levels of education. According to a Report by the ILO, the majority of female domestic workers in the KSA interviewed had restrictions on their movement that is they were not allowed to leave the house for any daily activity. This restriction of movement was facilitated by the confiscation of their passports. The employers justified this act by claiming that confiscating the legal documents make their employee more 'loyal' to their work.¹²⁹ Thus, the researcher believes that the KSA Government needs to come up with a way to create a balance between the demands of the employer and the rights and needs of the employee.

The same rule is applicable to workers from Bangladesh and India who are employed on construction sites and who are often subjected to forced labour due to unfavourable working environments and debt bondage that needs to be paid, which is often labelled as recruitment fees.¹³⁰ Indeed, one of the most obvious examples of forced labour was seen in recent times when a huge number of employees were

<http://nshr.org.sa/wp-content/uploads/2013/11/696:_PDF.pdf> accessed 20 April 2014. The new laws provide some protection, including working hours and opening a bank account in which to deposit wages.

¹²⁸ BBC, 'Yemen Issue Because of the New Labour Law in Saudi Arabia' (BBC, 2013) <http://www.bbc.co.uk/arabic/middleeast/2013/04/130411_yemen_saudi_arabia_deporting_migrant_s> accessed 28 April 2014.

¹²⁹ ILO, *Report on Gender and Migration in Arab States: The Case of Domestic Workers* (ILO 2004) 50.

¹³⁰ Human Rights Watch (HRW), *Bad Dreams: Exploitation and Abuse of Migrant Workers in Saudi Arabia* (HRW 2004).

deported from the KSA in return for which they demanded their financial rights before leaving.¹³¹

Due to these disparities, there has been continuous work to improve the 2005 Saudi Labour Law in terms of protecting workers more effectively. Even though this is an encouraging step, it is still not enough to guarantee the protection of these workers. There is a need to provide sanctions for the traffickers, involved in forced labour and the involvement of the organized crime laws, and law enforcement agencies, and to ensure the protection of the victims. The researcher believes that such steps are necessary to protect the rights and wages of the victims of forced labour in the KSA, and to combat the underlying crime and criminal organizations.

6.4.2 The 2005 Saudi Labour Law and the Prevention of Human Trafficking for Forced Labour

Foreign immigrants employed in the KSA under compulsory and forced labour are usually trafficked victims. They are coerced to work in conditions that indicate 'involuntary servitude, non-payment of wages, long working hours each day, physical and sexual abuse'.¹³² It is binding upon a Saudi employer to follow the provisions of Part III of the 2005 Saudi Labour Law titled 'Employment of Non-Saudis', both prior to and during the term of employment. Also, it is provided by Article 37 of the Saudi Labour Law that all foreign workers in the KSA are permitted to work for a specified time period as per the contract.¹³³ Article 51 of the 2005 Saudi Labour Law states that it is necessary for a copy of the work permit to be in the possession of both the employer and the employee. Since domestic workers rarely sign such contracts, their fate as employees remains a matter of concern, and the unpredictability of their position means that they are vulnerable to exploitation by their employer. Another provision of the Saudi Labour Law, article 59, states that a monthly paid employee shall not be reclassified as a weekly, daily, hourly, or piecework paid employee unless agreed upon by the employee himself. Article 60 states that 'a worker may not be

¹³¹ US Department of State, *Trafficking in Persons Report* (June 2011).

¹³² US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2014).

¹³³ Saudi Labour Law: Royal Decree No M/51 (n 69).

assigned duties which are essentially different from the work agreed upon without his written consent, except in cases of necessity and that not beyond 30 days'.¹³⁴ Here, necessity refers to temporary circumstances. Also, the chapter titled 'Duties and Disciplinary Rules' in Part V of the Labour Law provides a description of the duties of employers.

A vital part of the legal framework is seen in article 61, which can be used by the Saudi Courts to enforce the prohibition on forced labour. According to article 61, an employer must 'refrain from using the worker without pay and shall not, without a judicial instrument, withhold the worker's wages or any part thereof'.¹³⁵ This article does not define the meaning of the word 'worker'; therefore, article 2 is used for this purpose. It states a worker is 'any natural person working for an employer and under his management or supervision for a wage, even if he is not under his direct control'. Also, article 61 fails to describe the nature of illicit work. This is done in article 4, which states that 'the employer and the worker shall adhere to the provisions of *Shari'ah*'. Thus, any sort of task that does not respect the boundaries of the *Shari'ah* is considered illicit as per the Saudi Labour Law. The article also prohibits the employer from disgracing the religious and moral values of an employee.

It is stated in article 62(2) and (3) that all employees must be aided in carrying out their work legally and without the fear of their wage being deducted. An interesting point to note here is that the disciplinary rules set out in article 65 have a potentially damaging implication for employees.¹³⁶ According to this provision, an employer is permitted to conduct the 'withholding of allowance, or postponing it till one year but not beyond'. Naturally, this provision goes against many international provisions that emphasize the importance of protecting against forced labour.¹³⁷ Cessation of work permits and confiscating the pay of employees has been done in the past, which is against the provisions of international treaties. This shows that disparities are seen within the

¹³⁴ *ibid.*

¹³⁵ *ibid* art 61(1).

¹³⁶ Joseph Kéchichian, *Legal and Political Reforms in Saudi Arabia* (Routledge 2012).

¹³⁷ James Pope, 'A Free Labor Approach to Human Trafficking' (2010) 158 *University of Pennsylvania Law Review* 1849-1875.

Saudi Labour Law which makes it less compatible with international regulations pertaining to forced labour, slavery and servitude.

Annual leave is granted to workers under article 87. Article 88 makes it necessary for the employer to 'clear all pay/wages and settle entitlements within a week from date of end of contract'. Article 89 discusses the matter of minimum wage by stating: 'The Council of Ministers may, when necessary and upon a proposal by the Minister, set a minimum wage.'¹³⁸

A notable observation is that debt bondage is another form of forced labour that is very frequently used by employers.¹³⁹ Article 92 prohibits this and states: 'No amount shall be deducted from the worker's wages against private rights without consent of worker, except (1) repayment of loans provided the deduction is not above 10% of employees wage.' For the purpose of addressing the complaints of employees, article 94 (1) states that cutting down the wages of the employees for any reason apart from what is legally permissible shall be decided upon by the Commission for the Settlement of Labour Disputes by hearing the employee and their position. The Commission for the Settlement of Disputes functions with the support of the MOL and acts within the boundaries of the Shari'a Courts' structure.

It is stated in article 97 that it is necessary for the employee to receive 50% of their wages in a situation where they are detained by the company. Pursuant to article 98 of the Saudi Labour Law, working hours are limited to eight hours per day, when the criteria for payment is on a daily basis. On a weekly basis, it is limited to forty-eight hours per week. Also, during the course of the month of Ramadan, Muslims shall not be made to work for more than six hours. It is provided by article 101 that workers shall not be made to work for longer than 5 hours at a time without being granted rest for 30 minutes.¹⁴⁰ It was in January 2014 that the MOL held a workshop to train government officials regarding the execution of revised labour laws and the way in

¹³⁸ Saudi Ministry of Labour, 'A List of Domestic Workers and Their Equivalents in Saudi Arabia' (Issued 15 July 2013) <http://nshr.org.sa/wp-content/uploads/2013/11/696_PDF.pdf> accessed 20 April 2014.

¹³⁹ Carles Muntaner and others, 'Unemployment, Informal Work, Precarious Employment, Child Labor, Slavery, and Health Inequalities: Pathways and Mechanisms' (April 2010) 40(2) *Int J Health Serv* 281-295.

¹⁴⁰ Kevin Bales, 'International Labor Standards: Quality of Information and Measures of Progress in Combating Forced Labor' (2002) 24 *Comp Lab L & Poly J* 321.

which they will be beneficial in combating human trafficking.¹⁴¹ It still has to be established how well these laws are working in practice.

6.4.3 Efforts of the Government of the KSA against Human Trafficking

The current legislation of the KSA has been used to combat the issue of human trafficking. However, due to the increase in human trafficking in the KSA, there has been debate regarding the current level of awareness in the region. At an international level, the KSA has been working to ensure coordination with the UN TOC Convention and the UN Trafficking Protocol.¹⁴² Also, being a member of the UN TOC Convention and the UN Trafficking Protocol, the KSA has been working to combat this crime on a domestic level. The KSA Government believes that this crime is now a national priority;¹⁴³ therefore, it is committed to combating this crime. The focus of the KSA is on four levels: legislation, enforcement of law, support of the victim, and, recognizing that this is mainly a transnational crime, international collaboration.¹⁴⁴

The purpose of this section is to consider the specific regulations against human trafficking in terms of the UN Trafficking Protocol. Due to the increased incidence of human trafficking and the increase in pressure from international agencies, there is a need for effective regulations to improve the image of the state on a global level, and to actually protect Saudi citizens and others resident in the Kingdom. Thus, the KSA Government released the KSA 2009 Trafficking Law after the ratification of the UN TOC Convention.

Human trafficking is defined by the KSA 2009 Trafficking Law under article 1.a:¹⁴⁵

Trafficking in Person: 'Use, recruiting, transfer, transferring, or receiving persons for the purpose of abuse.'

¹⁴¹ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2014).

¹⁴² UNODC, 'Signatories to the United Nations Convention against Transnational Crime and its Protocols' <<http://www.unodc.org/unodc/en/treaties/CTOC/signatures.html>> accessed 16 November 2014.

¹⁴³ NCCTP (n 73).

¹⁴⁴ *ibid.*

¹⁴⁵ Royal Decree No M/40 of 2009 (n 73).

Article (2): Prohibits trafficking in any person in any form including forcing, threatening, defrauding, deceiving, kidnapping him/her. Prohibiting an exploiting position, authority, exploiting a person's weakness, or giving person money or benefits to gain approval of one person to control another person for the purpose of exploitation. Prohibits sexual assault, forced labour or service, begging, services, slavery or practices similar to slavery, servitude or the removal of organs or medical experiments.¹⁴⁶

This definition is consistent with the one set out in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which complements the United Nations Convention against Transnational Organized Crime 2000, the Palermo Convention. To this Protocol, the KSA's Suppression of Crimes of Trafficking in Persons law 2009 made changes in order to add modern types of trafficking that were previously absent from the Protocol, particularly the conduct of medical experiments, and begging.

According to the Saudi definition, trafficking is defined as the hire, transfer, use, protection or receiving of persons, and the means used for this purpose, which might be coercion, forcing, kidnapping, threatening, lying, abuse of authority, exploitation, and carrying out an exchange of monetary or non-monetary benefits. The purpose behind trafficking may include forced labour, sexual exploitation, slavery, servitude, begging, removal of organs, and carrying out medical experiments.

It may seem that this definition is similar to the one used by the UN Trafficking Protocol as discussed in Chapter 2.¹⁴⁷ However, this researcher believes that it is still unique with regard to one factor that has been absent from the Protocol: the protection of trafficked victims, which is given in the 2009 Saudi Trafficking Law. The Law does not simply take on the restricted approach of the UN Trafficking Protocol,

¹⁴⁶ Art 1(B) also stated: 'Organized criminal gang: a group consisting of three or more persons conducting an organized act with the purpose of committing any of the human trafficking crimes in order to directly or indirectly gain a financial or any other material benefit.

Transnational Crime: A crime shall have a transnational character if:

1. It is committed in more than one country.
2. It is committed in one country but was plotted, planned, directed and supervised in another country.
3. It is committed in one country but by an organized criminal gang conducting criminal activities in more than one country.
4. It is committed in one country but its implications extend to another country.

Child: Any person who is less than 18 years old.'

¹⁴⁷ See further discussion in Chapter 2 above.

which only comprises the nature of the criminal activity and organized criminal group; it also makes an attempt at covering all sorts of trafficking, with special emphasis on these aggravating factors. This way the safeguarding of the victims of trafficking is enhanced in the KSA legal framework.

As the crime of human trafficking has become a serious issue within the region, the punishments for the criminals have increased accordingly, with imprisonment for up to fifteen years.¹⁴⁸ Where the crime is committed by a member of a corporate body (such as a charity organization or tourism company), then the punishment will be imprisonment for a term up to fifteen years or a fine of maximum of one million Riyals or both.¹⁴⁹

Moreover, the KSA 2009 Trafficking Law has special penalties when the crime is committed against children, women, or people with special needs.¹⁵⁰ There is a 24-hour emergency hotline run by the Saudi police, who speak a variety of languages, to which abuse arising from human trafficking can be reported. All the legal immigrant workers are provided with a guidebook by the Saudi MOL to increase their awareness on human trafficking and their rights.¹⁵¹

The KSA provisions have been inspired by the Model Law to Combat Trafficking in Persons of the Gulf Cooperation Council (the 'GCC Model Law'). With the purpose of protecting the victims of trafficking, the KSA formulated its laws according to the GCC Model Law. Thus, it is possible for trafficked victims to receive help pursuant to Article 14 of the GCC Model Law.¹⁵² According to the GCC Model Law, trafficked victims have the right to claim medical assistance, obtain legal information, regard themselves as trafficked victims, obtain psychological rehabilitation, receive security, obtain shelter, and stay in the region if necessary.¹⁵³ The KSA legal system provides these rights pursuant to the 2009 Saudi Trafficking Law. Also, the MOL is active in raising the

¹⁴⁸ 2009 Saudi Trafficking Law, art 3.

¹⁴⁹ *ibid.*

¹⁵⁰ 2009 Saudi Trafficking Law, art 4(2.3).

¹⁵¹ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2013).

¹⁵² Co-operation Council for the Arab States of the Gulf (GCC), Abu Dhabi Document System (Law) Consolidated to Combat Human Trafficking for the GCC, final communiqué of the twenty-seventh session, 9-10 December 2006.

¹⁵³ Mohamed Y Mattar, 'Human Rights Legislation in the Arab World: The Case of Human Trafficking' [2011] *Mich J Intl L* 33, 17.

awareness of migrants regarding their rights and also in assisting them in reporting cases of human trafficking.

It has been mentioned above that KSA's national labour law does not permit domestic workers to receive help under the given law. In order to reduce the problems caused by this lack, the national law of the KSA devised the 'Protection from Abuse'.¹⁵⁴ Under this law, women, children, and domestic workers shall be protected. Previously, abuse against women, children, and domestic workers was dealt with by the general penal code based on Islamic *Shari'ah* law. The judges made their decision based on their understanding of the *Shari'ah* codes, which viewed domestic violence as a personal matter. Now, the decision is based on the stated law. Domestic violence offenders are prosecuted pursuant to this 17-article Law. Thus, the previous absence in the legal system with regard to protecting domestic workers, who were regarded as being part of the family, and covered by family law rather than employment law, has now been remedied by this Law.¹⁵⁵

The recent 'Protection from Abuse' law is observed as a 'welcome move' from international human rights watchdogs.¹⁵⁶ Furthermore, the legal establishment in Saudi Arabia regards 'Protection from Abuse' law as a regulation that would give independence to women and domestic workers.

Furthermore, the purpose of the 2005 Saudi Labour Law is to provide protection to the victims of forced labour. Other than the Labour Law, the Charter on Human Rights under Arab League membership,¹⁵⁷ the Covenant on the Rights of the Child in Islam under the OIC framework,¹⁵⁸ the GCC Model Law under its membership in Gulf Cooperation Council are also used for the same purpose. Thus, it would not be wrong to say that in spite of its original placement in Tier 3 for human trafficking, the KSA was

¹⁵⁴ Mahmoud Hobboush, 'Saudi Arabia Passes Kingdom's First Domestic Abuse Law' (*Reuters*, August 2013) <<http://www.reuters.com/article/2013/08/29/us-saudi-women-violence-idUSBRE97S0Q620130829>> accessed 14 September 2014.

¹⁵⁵ *ibid.*

¹⁵⁶ Human Rights Watch (HRW), 'New Protection for Saudi Arabia's Domestic Workers' (*HRW*, February 2014) <<http://www.hrw.org/news/2014/02/19/dispatches-new-protection-saudi-arabia-s-domestic-workers>> accessed 14 February 2015.

¹⁵⁷ League of Arab States website <<http://www.lasportal.org/>> accessed 2 October 2013.

¹⁵⁸ Organisation of Islamic Cooperation (OIC) <<http://www.oic-oci.org/oicv2/states/>> accessed 2 October 2013.

attempting to improve its stance on the protection of trafficked victims, to include children. This has now been reflected by listing the KSA as a Tier 2 watch list country in 2015. Notwithstanding such attempts, as with other countries, there will be issues around getting the laws to work properly, and the KSA still needs a better framework for the protection and rehabilitation of all trafficked victims and forced labourers. In contrast to the KSA, the UK is further down the road in taking adequate measures to recognize, safeguard, and rehabilitate the trafficked victims, and also grants them access to services irrespective of their immigration status. The UK system, which is currently undergoing a process of further reform, has been analysed in detail in Chapter 5 of this thesis.

6.5 NATIONAL MEASURES TO PROTECT HUMAN TRAFFICKING VICTIMS IN THE KSA

Although the KSA 2009 Trafficking Law provides necessary protective measures required for trafficked victims,¹⁵⁹ the issue is also addressed in the BLG.¹⁶⁰ It is stated under international law that providing protection to the trafficked victim means to provide for the basic human rights of such victim. Article 6 of the UN Trafficking Protocol deals with this matter;¹⁶¹ it pays due respect to important matters of protecting the victims, such as protecting the right to safety,¹⁶² the right to privacy, the right to obtain residence, the right to compensation, the right to return, the right to a court hearing, the right to information, the right to have legal representation, and the right to assistance.¹⁶³ These fundamental rights must be provided to all the victims of trafficking, irrespective of whether they are reluctant to acquire a legal court order or are immigrants.¹⁶⁴

¹⁵⁹ 2009 Saudi Trafficking Law, art 15.

¹⁶⁰ Art 26, which states: 'The State shall protect human rights in accordance with the Islamic Shari'a.'

¹⁶¹ See Chapter 4.

¹⁶² See Chapter 4.

¹⁶³ Mohamed Y Mattar, 'The Victims of Trafficking Bill of Rights' (Statement to the International Conference on '21st Century Slavery: The Human Rights Dimension to Trafficking in Human Beings', Rome, 15-16 May 2002).

¹⁶⁴ The Council of Europe Convention on Action against Trafficking in Human Beings, art 12 para 6: 'Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.'

Moreover, provision of shelter is also an important right. In a case where the victim is required to testify in the prosecution of a criminal act, then providing safety to such a victim is essential. Also, provision of legal, medical, social and, psychological assistance is also the right of such victims.

According to article 15 of the 2009 Saudi Trafficking Law, in order to keep these rights under consideration, a particular strategy is used to deal with the task of inquiry and decision making while handling cases of human trafficking.¹⁶⁵ This strategy makes it necessary for the investigating authorities to make the victims aware of their basic human rights in a language that is comprehensible to them. The victim is permitted to seek medical or psychological assistance, and their admission in a medical, social, or psychological rehabilitation centre is also possible according to need. Furthermore, it is the victim's right to have some form of residence. Provision of security and residence is also one of their fundamental rights. Finally, if the victim wishes to remain in the state for personal reasons, the court must ensure that the decision made is in line with the wishes of the victim.¹⁶⁶

Individual rights provision is a basic necessity under the religion of Islam. Therefore, this consideration is paid due regard when handling human trafficking cases in the KSA. Guaranteeing the rights of individuals is vital to Islam, although it is done in a different way to the human rights approach taken in the West/ UK and Europe. Being a source of trouble or discomfort is strictly forbidden to practicing Moslems, and related warnings are mentioned 299 times in the Holy Koran.¹⁶⁷ Also, the words 'equality' and 'justice' are repeated 16 times. The Prophet (PBUH) mentioned in his last sermon that 'there is no superiority of an Arab over a non-Arab' and that 'all Muslims are brothers unto one another'. Thus, it can be said that providing safety and protection is one of the fundamental principles of Islam. Most trafficking victims and illegal immigrants into the KSA are Moslems. No difference however, is made in the application of KSA laws where the victims are non-Moslems

¹⁶⁵ Royal Decree No M/40 of 2009 (n 73).

¹⁶⁶ *ibid.*

¹⁶⁷ Zemzemi Yahya, 'Human Rights in the Koran' <<http://media.tafsir.net/ar/books//959/6166.pdf>> accessed 12 June 2014.

The provisions of Islamic law are all concerned with the need to protect the rights of the victims and to adequately compensate them. Islam believes that the right to sanctuary, safety, and relocation by the regulatory authorities of a victim who has had their life or property threatened is mandatory. Since most of the victims face danger from their traffickers, it is therefore necessary to provide them with protection even in the KSA to which they choose to immigrate. Guaranteeing their protection is synonymous with following the teachings of the Prophet (PBUH), who himself went through immense trouble in his life and had to migrate.¹⁶⁸

According to the researcher, measures pertaining to the protection of trafficked victims are special in nature as they need to be implemented prior to or upon uncovering the crime, and should be continued even after the trial ends. Moreover, it is permissible for the victims to receive protection from the legal system by informing the authorities of their situation or by seeking legal immunity.¹⁶⁹ Also, the victim will not be held responsible for crimes committed in the context of human trafficking.

Compensating the victims of trafficking is a means of legally protecting their rights by the state. Even though the KSA 2009 Trafficking Law does not address the matter of compensating the victim, it is addressed in NCCTP.¹⁷⁰ Furthermore, there is one protective action that is not specified in the 2009 Saudi Trafficking Law: the grant of a 'temporary' resident permit to all victims who agree to cooperate with the authorities in the pursuit of identifying the criminals.¹⁷¹ Since the permit is not permanent in nature and therefore deportation is inevitable, it discourages many victims from agreeing to help the investigating authorities. Undoubtedly, this acts as a drawback as the temporary resident permit only lasts for as long as the case does. For this reason, the victims are hesitant to seek help from the investigative authorities unless they are legally identified as being victims of trafficking. Once their status of being victims is

¹⁶⁸ United Nations Office on Drugs and Crime (UNODC), 'Combating Trafficking in Persons in Accordance with the Principles of Islamic Law' United Nations New York (UN 2010).

¹⁶⁹ This committee comprises officials of the Ministry of the Interior, the Ministry of Justice, the Ministry of Foreign Affairs, the Ministry of Social Affairs, the Ministry of Labour, the Ministry of Culture and Information, and the Human Rights Commission. It came into being after the approval of the Council of Ministers' Decision No 244 of 20/7/1430 AH (13/7/2009).

¹⁷⁰ The Saudi Human Rights Commission's Standing Committee to Combat Crimes of Trafficking in Person, *Report of Human Trafficking in Saudi Arabia* (2012).

¹⁷¹ 2009 Saudi Trafficking Law, art 12.

legalized, they are eligible to receive a temporary residence permit. Through this permit, they may avail themselves of all financial, social, and legal support; however, their movement is still restricted. They are also exempted from paying any fines incurred because of the problems faced by them at the end of their visa, something which may incentivize engagement with the authorities in this area. Furthermore, if the victim otherwise possesses a regular residency status, then they are provided with employment opportunities as well as legal protection by the government,¹⁷² until the case is finished. Having discussed these provisions, the researcher believes that the KSA Government must consider the possibility, at least, of granting a permanent residence permit to such victims who agree to cooperate with the investigative authorities and cut ties with the traffickers. The researcher is aware that the UK authorities take a more lenient line in this area as discussed further in Chapter 5 of this thesis.

A major issue lacking from the KSA 2009 Trafficking Law is that of the identification the victims of trafficking. Even though the UN Trafficking Protocol neither defines the phrase ‘victim of trafficking’ nor mentions provisions pertaining to the identification of the victims,¹⁷³ this has been rectified for European countries members of the Council of Europe, to include the UK, in the COE Trafficking Convention in Europe.¹⁷⁴ The 2009 Saudi Trafficking Law, and its operation, still needs to address this issue. The researcher believes that the failure to correctly identify the victims of trafficking is a major issue for law enforcement, and victim protection in this area especially in the absence of competent investigating authorities. Hence, the researcher believes that properly defining the victim of trafficking by the KSA 2009 Trafficking Law is important, in order to focus on this issue, bring clarity to the legal framework, and effectively tasking the relevant authorities with making the law work. Along with the provision of a proper definition, the Law should also have regard to setting up teams of specialists or committees, who would be responsible for identifying the circumstances of the victims, and correctly analysing their situations. This step would ensure that such victims are provided with the appropriate kind of help and the correct degree of help

¹⁷² US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2007).

¹⁷³ See further in Chapter 4.

¹⁷⁴ *ibid.*

and protection by the authorities. It would also facilitate improved law enforcement in this crime area. Since this provision is lacking from the KSA's legislation, the KSA is still placed under Tier 2, as being less effective in tackling THB, in comparison to other countries in the recent categorization of the US Trafficking Report.¹⁷⁵

This particular approach of identifying the victims is also encouraged by the recent US Department of State Report 2014. This report focuses on the significance of training and providing adequate resources to community workers, private-sector professionals, regulatory authorities, and others, for the purpose of appropriately and correctly identifying the victims of trafficking.¹⁷⁶

It is the responsibility of several agencies to correctly identify the victims of trafficking. Government agencies' officials, such as immigration inspectors, labour inspectors, consular officers, factory inspectors, and others who have significant authority in State matters should be trained to carry out this task properly. Moreover, people belonging to the healthcare sector who frequently come into contact with such victims at private clinics, hospitals, and emergency rooms, must also be trained accordingly. Next, private-sector professionals of farms, restaurants, and construction sites must also be trained, as these are the locations used to carry out trafficking. Also, bus, truck, and taxi drivers, flight supervisors, and other individuals belonging to the transportation sector should be informed of the process of identifying the victims. Finally, people belonging to the education sector, and possibly also the charity and religious sectors who would encounter vulnerable people during the course of their day to day work must also be trained and educated along these lines to prevent this menace from expanding further.

In addition to legal and safety measures, the trafficked victims are also supported by certain remedial measures. These are not addressed by the KSA 2009 Trafficking Law but are nevertheless provided by the State. The purpose of these measures is to provide help, sustenance, and rehabilitation to the victims of trafficking involved in sexual and labour exploitation. Given below are some of the most vital systems involved in combating this crime.

¹⁷⁵ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2014).

¹⁷⁶ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2012).

6.5.1 The National Committee to Combat Crimes of Trafficking in Persons (NCCTP)¹⁷⁷

The NCCTP came into existence after being approved by the Council of Ministers' Decision No 244 of 20/7/1430 AH (13/7/2009). It consists of authorities from the Ministry of Justice, the Ministry of Social Affairs, the Ministry of the Interior, the Ministry of Culture and Information, the MOL, the Ministry of Foreign Affairs, and the Human Rights Commission. The following are some of the characteristic duties of this Committee.¹⁷⁸ It ensures that the victims of trafficking are duly recognized, and are kept in appropriate conditions and are not abused. It also manages communication links with other concerned agencies and helps in the repatriation of victims, or helps in allowing victims to stay within the KSA with a work permit. Moreover, it is responsible for establishing links required for data collection related to human trafficking, and helps in running awareness programs that seek to combat human trafficking.

To ensure that all these tasks are carried out effectively without problems, the NCCTP¹⁷⁹ has designed a particular vision for its functioning: to combat human trafficking and to ensure the safety of the victims. The vision has certain objectives.¹⁸⁰ It aims to keep a record of human trafficking cases so that the extent and pattern of this crime in the KSA can be determined. Moreover, it aims to prosecute the offenders, assist in the rehabilitation of trafficked victims on social as well as legal grounds, establish communication links with other national and international agencies, and eliminate this crime from the KSA.¹⁸¹

There have also been several training sessions by the NCCTP¹⁸² to combat human trafficking as a crime. It is the responsibility of the NCCTP to ensure that the human trafficking regulations are correctly employed. It also ensures that communication gaps

¹⁷⁷ NCCTP (n 73).

¹⁷⁸ *Report of Human Trafficking in Saudi Arabia* (2012) (n 170).

¹⁷⁹ NCCTP (n 73).

¹⁸⁰ *Report of Human Trafficking in Saudi Arabia* (n 170).

¹⁸¹ The NCCTP is a national committee operating under the umbrella of the Saudi Human Rights Commission. The main aim of this committee is apply all laws that issued to combat human trafficking and the protection of victims with the relevant authorities. It consists of authorities from the Ministry of Justice, the Ministry of Social Affairs, the Ministry of the Interior, the Ministry of Culture and Information, the Ministry of Labour, the Ministry of Foreign Affairs, and the Human Rights Commission.

¹⁸² NCCTP (n 73).

are duly filled with the help of the KSA 2009 Saudi Trafficking Law. The NCCTP functions to combat human trafficking with the aim of increasing the efficiency of police officers, investigators, or agencies such as the Ministry of the Interior, the Ministry of Justice, the Ministry of Social Affairs, the MOL, the General Presidency of the Commission for the Promotion of Virtue and the Prevention of Vice, the Bureau of Investigation and Public Prosecution, and the Human Rights Commission, it working as a complementary group to face this crime.

Furthermore, the NCCTP has also been consistent in its efforts to use the Naif Arab University for Security Sciences and the Institute of Diplomatic Studies at the Ministry of Foreign Affairs to develop its policy and practice areas. It is the result of this collaboration that several seminars, workshops, conferences, and training drills have been conducted so far with the aim of improving the working capabilities of all concerned agencies for both officers and practitioners.¹⁸³

5.5.2 The Anti-Begging Department at the Ministry of Social Affairs

Additionally, the main activity in which the Anti-Begging Department at the Ministry of Social Affairs is involved is fighting the occurrence of begging and thereby reducing the exploitation of children, women, and people with disabilities in that area. This department is working with the Ministry of the Interior in this process. The department runs a check on the socio-economic and medical conditions of beggars and seeks to provide them with the necessities of life according to their respective needs. It also sends beggar children who are not more than 18 years old to special care centres where they are provided with the necessary social, medical, and psychological help until the time their families are found. In cases where exploitation in monetary benefits are found to be used with begging, the bureau of investigation is contacted so that not only the criminals involved are interrogated, but also the victims are provided with protection and better living standards.¹⁸⁴

¹⁸³ *ibid.*

¹⁸⁴ *ibid.*

6.5.3 The Expatriate Workers' Welfare Department

This Department works under the supervision of the MOL and is responsible for preventing all unfair labour practices. The MOL also works in collaboration with the Ministry of Social Affairs by maintaining a record that consists of the details of abusive employers and how to punish them. Furthermore, the Department ensures that staff are provided with the necessary assistance for their job and any problems that they might face. Most importantly, it ensures that the Saudi Labour Law is strictly implemented and the rights of immigrant workers are safeguarded at every level.¹⁸⁵ The main problem here is that illegal immigrants would not be registered with the MOL, as discussed above, and therefore would not benefit from its protection.

6.5.4 The National Commission for Childhood

This was formally known as the Saudi National Commission for Childhood until 2005 (1426 AH). Following the change, a committee was founded within this Commission, which is responsible for providing all feedback to the Ministry of Education. The main purpose of this committee is to ensure that the rights of every child are equally protected. It does this by increasing awareness regarding the educational and social privileges of children, by devising plans for the Government that will help in providing protection to children and keeping them away from begging, labour exploitation, and other dangers, and by coordinating with other national and international bodies that are also fighting and working for the same cause.¹⁸⁶

6.5.5 The National Family Security Programme

This came into being in 2005 (1426 AH) in response to the local mistreatment and abuse inflicted on children, in order to safeguard the rights of such children who would otherwise have become victims of human trafficking. It is working to increase awareness with respect to this crucial issue and to enhance the regulatory actions by

¹⁸⁵ *ibid.*

¹⁸⁶ *ibid.*

coordinating with various national and international bodies. It is also responsible for providing special information and safety incentives to victimized children.¹⁸⁷

One of the many objectives for the creation of this Programme is to give victims of human trafficking all amenities free of cost in the KSA for a sufficient time. These amenities comprise: secure living area, a helpdesk, assessment unit, healthcare, mental assistance, legal guidance and help from the consulate and labour services. Along with these primary amenities, the Programme also provides secondary amenities such as: schooling for children, entertainment events, employment services, physical well-being amenities, and enfranchisement as well as skills training.¹⁸⁸ This assistance is for women and children who have suffered sexual abuse, labour mistreatment, been forced to beg, or have been taken into service at homes.¹⁸⁹ Each of the victims of trafficking has the right to access these amenities unconditionally, for as long as they are victims of human trafficking, unlike in the UK.¹⁹⁰

The pie chart below depicts the different types of exploitation for which individuals were trafficked in the KSA between 2012 and 2013. Sexual exploitation,¹⁹¹ as seen from the chart, was the most prominent reason. This was followed by begging. Forced labour, where most of the male victims would typically be found, was the least prominent reason.¹⁹² Most of the victims had suffered sexual exploitation and forced labour and were either referred by the police, the prosecution, or officers from the Immigration Department, or came of their own accord.¹⁹³

¹⁸⁷ *ibid.*

¹⁸⁸ *ibid.*

¹⁸⁹ The program includes all women, men and children, but the Law focused on children and women; therefore, the protection of men who have been forced to beg and the disabled or special needs male adults are included in BLG Law, art 26.27.

¹⁹⁰ See further section 6.3 below.

¹⁹¹ The KSA legal system recognized the sexual exploitation of children or adult males as sodomy, which is a sexual offence punishable by law like *Zina*.

¹⁹² NCCTP (n 73).

¹⁹³ *ibid.*

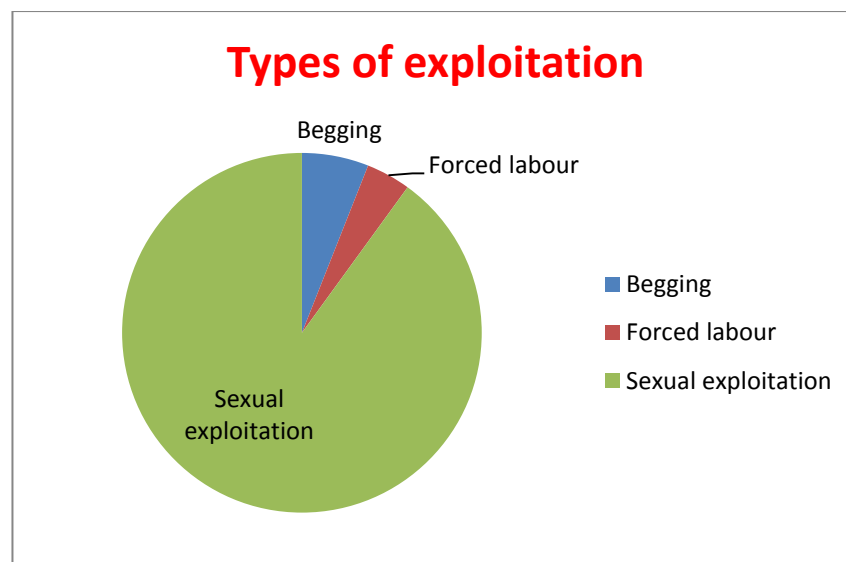


Figure 3 Types of exploitation in the KSA¹⁹⁴

Nonetheless, a question needs to be considered regarding the ways to identify human trafficking victims. The issue arises as to who is responsible for finding and identifying a victim of trafficking in the KSA. Without doubt, the aforementioned benefits are given only to victims of trafficking. Therefore it is essential to have an effective and clear method of identification of actual or potential victims of trafficking. This is done to ensure that the facilities that are given to the victims are not misused, as well as to ensure that victims are not left without these facilities due to the inability of officers to identify the victims.

Even though the KSA 2009 Trafficking Law has not yet created a department to deal with this specific task, the NCCTP has a group of specialists focusing on the basics and expertise to interview a target in cases where the person has identified himself or herself as a victim, along with language interpreters,¹⁹⁵ if required, to describe the mental and behavioural pointers, as well as medical issues, if the person has any, along with any prior correct determination of victims that have been trafficked.¹⁹⁶ This is invaluable so as to ensure that assistance is given to the trafficked individuals in association with the KSA's responsibilities as per the UN Trafficking Protocol. However,

¹⁹⁴ Issued by the NCCTP in 2014.

¹⁹⁵ The researcher believes that there might be a serious issue here in terms of resources. It will obviously need to develop in the future in order to develop sufficient capacity to effectively cover the whole country.

¹⁹⁶ *ibid.*

this researcher is of the opinion that the issue of identifying the victims of human trafficking are specifically determined by psychological, ethical factors, social and moral issues should be carried out by an independent judicial establishment.¹⁹⁷

The hard work of those providing refuge to the victims of trafficking for labour do ensure that the UN Trafficking Protocol is applied. Yet, such refuge is restricted to females and children which measures are available in the main regions of the KSA. The Government has not yet determined the course of action for men being compelled to work as labourers, specifically those who come to the KSA of their own accord. This restriction is similar to the situation before the UN Trafficking Protocol, regarding fighting the trafficking of females and children since 1921, exclusive of protection for men.¹⁹⁸ The Protocol, however, has gone beyond such limitation. The judicial agencies made the error of referring all cases of forced labour to the MOL. This is definitely contrary to the UN Trafficking Protocol and the 2009 Saudi Trafficking Law. Some are clearly forced labour issues, but most are not, and many are not covered by the MOL's protection. Conversely, the researcher believes that the KSA legislature should review this problem, with a view to granting complete security to all human trafficking victims.

6.6 ANALYSIS OF THE KSA GOVERNMENT'S EFFORTS TO COMBAT TRAFFICKING

In the researcher's opinion, many interpretations regarding the explanation of the judicial agencies in the KSA can be derived by defining the national efforts that the country has made. First, the judiciary of the KSA highlights only the hard work that is undertaken to prosecute traffickers who are involved in sexual exploitation of females and children specifically; and when children are compelled to work only in instances of begging. Forced labour and forced prostitution is not addressed sufficiently, and accordingly the KSA made some progress to prosecute offenders and protect trafficking victims, which has led to it being in the Tier 2 watch list classification according to the latest categorization in the *US Trafficking in Persons Report 2015*.¹⁹⁹ It

¹⁹⁷ NCCTP (n 73).

¹⁹⁸ See further Chapter 1.

¹⁹⁹ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2015).

is probably considered that lack of experience and knowledge with instances of mistreatment related to employment is one of the issues in the KSA especially the domestic workers. In applying schemes to combat human trafficking for labour, it is essential that the Government ensures that health, mental, and judicial assistance is sympathetic to the needs of the victims of trafficking, whether they are male or female, and taking the age of any child (under 18 years) victim into account. In order to do this, the Government should acquire certain mechanisms to better help men, such as the provision of special facilities for them instead of sending them to the Expatriate Workers' Welfare Department, which is based at the MOL. In this way the Government can guarantee the protection of all victims of trafficking.

Moreover, there is no official method for the Government or the NGOs to establish the identity of a victim.²⁰⁰ For instance, currently the Government is unable to refer victims to specialists or experts, to determine why they are victims of trafficking and to investigate whether those who are trafficked are victims or became involved voluntarily. It is because of this that the figures show a decrease in the number of people identified as human trafficking victims. Victims who are given facilities of assistance for instance, in 2013 there were some cases regarding to forced labour victims,²⁰¹ either showed themselves to be the victims of trafficking to the authorities, such as the immigration officers, or police, or were sent from other organizations, such as social help facilities and embassies.²⁰² Hence, since there has been no method to identify who the actual trafficked victims are, the refuge afforded to victims of human trafficking may have been misused by those who present themselves as victims of trafficking in order to reap the bounties and return to their homeland easily. This underlines the need for an official method to identifying who the actual trafficked victims are. Identification of human trafficking victims is not without difficulty. Many officers usually identify women as victims and overlook men. If the victim is male, then he may be treated as an illegal immigrant instead of being seen as exploited victim and may be deported or prosecuted for crimes he has not committed, or has committed

²⁰⁰ *ibid.*

²⁰¹ NCCTP (n 73).

²⁰² US Department of State, *Trafficking in Persons Report* (June 2014); Approximately 400,000 foreign workers has been deported from the KSA by the government by November 2013 in a government crackdown on foreign workers.

under duress from the organized crime gang. Similarly, offences involving men as victims of trafficking are often rejected as an infringement of labour laws rather than be treated as a criminal act, and possibly a matter for investigation as organised crime.

The attempts to highlight the forced labour situation are still few, even with the Government's realization that it is essential issue to be dealt with.²⁰³ This flaw may be because of their lack of efficiency in differentiating under the 2005 Saudi Labour Law between those who choose to work and those who are compelled to work. Even though most employees in the KSA fall within the 2005 Saudi Labour Law with regard to labour contracts, they are often vulnerable to oppression because of their debts, and this is, in effect, slavery,²⁰⁴ as discussed in Chapter 2.²⁰⁵ It is obviously inconceivable that records do not show any evidence of people being targeted into forced labour in a country where people from remote and poor states present as a greater part of the labour force.²⁰⁶ This shows a flaw in the control system, and the decreased ability to prevent people from other countries from being forced labour.

Illegal migrants are aware that Saudi Arabia is one of the best places, particularly for Moslems, for immigration. The World Bank Migration and Remittances Fact Book ranks Saudi Arabia fourth in the Top Immigration Countries, beaten only by the United States (US), Russia, and Germany.²⁰⁷ According to research undertaken in 2013, the number of people who migrated to Saudi Arabia is 9,723,214 and this number is around a third (28.7%) of the entire population. Immigrants comprise 3% of the refugees including 30.1% women in the refuges. Egypt, India, the Philippines, Pakistan, Indonesia, Bangladesh, Sri Lanka, Sudan, Yemen, and Jordan are the places from where many of the refugees arrive. Although refugees comprise only one third of the immigrants, they represent 70% of the labour force and 95% of the private-sector labour force.²⁰⁸ This shows how the KSA is dependent on immigrants for its workers.

²⁰³ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2014).

²⁰⁴ HRW (n 130) 10.

²⁰⁵ See further section 2.5.2 above.

²⁰⁶ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2014).

²⁰⁷ *Migration and Remittances Fact Book 2011* (2nd edn, World Bank 2011).

²⁰⁸ *ibid.*

The KSA Government must prosecute the employers of those who are forced to work, to include the employers of domestic workers, and prohibit the confiscation of employees' passports. It must also extend the 2005 Saudi Labour Law to include household workers, being those who are subjected to an unfair (*Kafala*) sponsorship system which gives greater rights to the owners at the expense of the employees. Equally, workers should be allowed to leave the KSA as and when they want to, without relying on their employer or sponsor. Ultimately, increasing the protection afforded to the victims of forced labour is equally as important as affording protection to victims of forced sexual exploitation and includes the provision of key facilities.

6.7 CONCLUSION

The aim of this chapter was to analyse and examine the legal system and relevant legislative framework to combat human trafficking and forced labour in Saudi Arabia from an Islamic perspective. The Saudi laws are in the preliminary phase of development, and there is a lack of clear, concise and effective definitions to deal with human trafficking. However, the KSA Government has begun drafting workable laws to address this issue.²⁰⁹

Given that the Saudi laws are in the early stages of development, there is very little jurisprudential history of human trafficking cases. The issue of how these laws operate in practice, as with the UK laws which are currently under reform, which were analysed in Chapter 5, will only be seen after a couple of years, once the laws have been given some time to bed in, an issue which may need to be revisited by later researchers. Although the criminalization and prosecution of human trafficking is critical as part of a positive action against trafficking, the rights of trafficked victims should also be effectively protected in Saudi Arabia in addition to the review of the *Kafala* and immigration systems.

²⁰⁹ For example, a list of domestic workers and their equivalents in Saudi Arabia was issued on 15 July 2013: Ministry of Labour, 'A List of Domestic Workers and their Equivalents in Saudi Arabia' (2013) <http://nshr.org.sa/wp-content/uploads/2013/11/696:_PDF.pdf> accessed 20 April 2014; Royal Decree M/40 (Law for Combating Crimes of Trafficking in Persons), Um Al-Quaran, (2009) (Saudi Arabia) <www.protectionproject.org/wp-content/uploads/2010/09/Saudi-Arabia_TIP-Law_2009_Combined.pdf> accessed 24 October 2014.

This chapter serves to provide a thorough analysis of the legislation of the KSA with regard to human trafficking as a crime. The Government of the KSA has been making efforts with the help of international organizations to control human trafficking. This has been made possible with the ratification of the UN Trafficking Protocol and the UN TOC Convention.

The main purpose of comparing the legal systems of the UK and the KSA is the level of similarity that exists between the two countries in terms of the prevalence of the crime of human trafficking. The UK is further down the road in developing its legal and operational response to the issue. It also benefits from regional organizations, and wealthier and more stable neighbours than the KSA. The KSA is dealing with human trafficking to a large extent, with figures increasing with the passage of time despite the legislation. The reason behind this is the economic prosperity seen in the region, and possibly also a higher level of awareness and better reporting of the crime in the Kingdom. There is also an increasing level of political instability amongst neighbouring states.

This chapter also examines the features of trafficking seen in the region. This includes an analysis of the purposes behind trafficking, such as labour and sexual exploitation, and how these issues are addressed within the KSA legal system. There are several legislative efforts described in this chapter and the way in which they are compatible with the Trafficking Protocol. It is necessary to now ensure that no gaps arise between the different KSA legislative responses. Finally, the chapter presents an analysis of the anti-trafficking efforts and the extent to which they have been effective in the KSA at this early stage of the various laws implementation.

The following chapter examines the various definitions of forced labour under the legal systems of the UK, and the KSA. It also discusses and analyses the philosophy of the third element of the offence of human trafficking, relating to the exploitation element, as an issue of the *mens rea* of a defendant when committing acts that comprise a trafficking offence.

CHAPTER 7: KSA AND UK LEGISLATION IN TERMS OF THE EXPLOITATION ELEMENT IN HUMAN TRAFFICKING FOR FORCED LABOUR

7.1 INTRODUCTION

In order to determine whether a crime has taken place, human trafficking rules can be applied, which are further governed by rules of procedure. The legislation has described trafficking as including both physical and mental elements; however, trafficking is clearly differentiated from other illegal practices. For instance, smuggling¹ is a crime which takes place at an international level and is separate from trafficking when it comes to ascertaining the kind of crime.² A thorough analysis of circumstances is often crucial in order to obtain a successful conviction. This chapter explores the elements that enable the court to decide criminal intent in the UK and KSA. Some commentators suggest that a special intent is required for trafficking crime and results in loss of rights of victims, as well as increasing the exposure to risk. Thus, the investigating authorities must analyse the trafficking crime in order to apply the appropriate punishment.

Chapter 2 analysed the three elements of trafficking, including the purpose of exploitation as a core element. As the chapter contains an in-depth analysis of the definition of the term 'human trafficking' and its elements, a keen focus is maintained on the issue of exploitation, which is a particular element of trafficking for forced labour. The UN Trafficking Protocol, the COE Trafficking Convention and new UK legislation, and the KSA legislation all require the element of exploitation. However, it must be noted that KSA and legislation of the three main jurisdictions of the UK place a varied degree of importance on exploitation, and this is examined in this chapter.

Although the KSA 2009 Trafficking Law and the COE Trafficking Convention provide a thorough and comprehensive definition of exploitation (in addition to a long list of forms of exploitation), what exactly constitutes exploitation is yet to be defined. The

¹ See further Chapter 3 section 3.3 above.

² As discussed in Chapter 2 above.

question arises whether it can be rightly identified that a person can be exploited while gaining from the exploitation or what exactly is the objective of exploitation. Exploring the outcomes of exploitation is very important in terms of both the limited results of exploitation, and the unlimited consequences for forced labour and other forms of exploitation. In the same vein, Wertheimer believes that the concept of a 'mere rhetorical placeholder for expressing disapproval'³ is being risked when such decisions are being made and the legal considerations pertaining to the concept are ignored. Thus, it is essential that this element is deemed to be one of the most important considerations in human trafficking.⁴

7.2 GENERAL BACKGROUND OF LABOUR EXPLOITATION

In December 2005 information was sought from the UK Government by the House of Lords' Joint Committee on Human Rights (JCHR) regarding action being taken to tackle the rising issue of human trafficking. The evidence provided to the JCHR by the Government constituted an acknowledgement that the largest issue in the UK concerns trafficking for prostitution and that there is a dire need to understand other forms of trafficking in order to assess whether a significant problem exists for the UK.

On 22 January 2007, the Prime Minister announced the UK's intention to sign up to the COE's Convention on Action against Trafficking in Human Beings.⁵ This would include identifying the number of victims, whereas the policy design would include methods which can improve the victim identification process as well as promoting a better understanding of victims' needs. The aim of the policy is to explore the nature and

³ Alan Wertheimer, *Exploitation* (2nd edn, Princeton University Press 1999) 5.

⁴ Conny Rijken, *Trafficking in Persons; Prosecution Form; A European Perspective* (TMC Asser Press 2003) 75.

⁵ Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report (2005) Council of Europe Treaty Series – No 197 Warsaw 16V.2005 Council of Europe. The terms of the convention would enshrine special protection for victims of trafficking – a 30-day reflection period within which victims can decide whether or not to co-operate with the authorities in taking legal action against their traffickers. After this period, the UK Government would then have to decide whether to return victims or grant them some form of leave to remain.

extent of various forms of trafficking so as to develop a policy response which is effective and considerate.

The research published in both the UK and the KSA focuses on the women and children who are primarily trafficked for sexual exploitation. Though these areas lack evidence, there are larger gaps when it comes to labour trafficking and its purpose. Therefore this part focuses on labour exploitation.

Labour exploitation in the name of human trafficking is not only a serious crime, but also constitutes a breach of human rights and labour law. It is an undeniable fact that it takes part in every country of the world, and yet there is lack of recognition and understanding of the issue. As a consequence, the gravity of the issue is ignored. Only a small number of the millions of trafficked persons are identified and a tiny proportion of the identified cases result in criminal prosecution.

The underlying purposes of human trafficking are identified as forced and sexual labour exploitation and commercial sexual exploitation. Different governing structures and laws are used by governments as a means of preventing and controlling forced labour. However, most of the time these laws are not adequate enough to ascertain whether the criminal act of forced labour has taken place. Nonetheless, these rules are elaborate enough to explain the concept of mental and physical slavery, as well as trafficking for forced labour purposes.

In order to identify victims of exploitation, there are a lot of circumstances that may suggest the practice of forced labour. The UN's Trafficking Protocol defines that recruiting, transporting, transferring, harbouring and receiving a human being without their consent involving the use of coercion, deception, threat, abuse, force or enticed benefits means that trafficking has taken place, and the perpetrator of such act is known as a human trafficker. Consequently, courts assess the presence of three main elements to identify whether trafficking has taken place: recruitment, deception/threat, and forced/sexual labour.

International bodies such as the United Nations High Commissioner for Refugees (UNHCR) and UN have developed elaborate frameworks to address the ever-increasing

challenges of human trafficking. However, unless and until the circumstances of trafficking match the formal definition of human trafficking, it cannot be determined accurately whether the crime has taken place. The term as defined by the UN does not take into account several motivations for the crime and tends to underestimate when a trafficker may have committed the crime. There is no doubt that the definition covers the general intents of human trafficking for forced labour, but the definition lacks the comprehensiveness required by the issue and its multi-dimensional nature.⁶

Evidence has suggested that the action, purpose and means to achieve the intended purpose are entwined and therefore rigorous investigation is required in order to establish the criminal activity. Whether it is adult or child human trafficking, the laws usually favour the trafficker or the abettor. The researcher Skrivankova has suggested that forced labour is defined in different contexts, the most common of which is the practice of human trafficking of forced labour and forced labour exploitation. Forced labour in relation to human trafficking attracted researchers due to renewed international concerns since the late 1990s. The ILO defines in its standards that all (a) work or service, (b) not voluntary and (c) which is exacted under the menace of penalty⁷ is to be classified as forced labour. When ambiguity was faced when distinguishing between the terms of domestic forced labour and human trafficking-led forced labour (the focus of this thesis), the ILO suggested the following as a means of indicating forced labour:⁸

- The abuse may be committed by the trafficker (or 'offender') with sexual and psychological violence such as destructive threats, blackmail, emotional harassment, humiliation, bullying. It is worth mentioning here that this kind of violence may involve coercion, even without using physical force, which inflicts shock, injury or other harm.
- The movement of the victim is restricted within a workplace or otherwise.

⁶ See further Chapter 3 section 3.4 above.

⁷ ILO FL Convention 1930, art 2(1) provides that labour extracted from a person under the menace of threat or penalty and for which the person was coerced may constitute forced labour.

⁸ Klara Skrivankova, 'Between Decent Work and Forced Labour: Examining the Continuum of Exploitation' [2010] (Joseph Rowntree Foundation).

- The victim is rendered indebted, the term being 'debt bondage'. This exploitation occurs in forced labour cases where the worker has to pay off the loan. Quite commonly, the offender hides the actual information from the victim and deceives him/her.
- Important legal documents are retained (including passports and identity papers).
- The victim is threatened with being handed over to law enforcement authorities.

It is expected that as the nature and extent of the definition expands, a greater number of cases will be reported and acknowledged by the authorities. The UK Home Office has estimated that there are approximately 10,000–13,000 victims of forced labour every year.⁹ Thus, greater protection for the victims of trafficking has been sought. The UK's legal framework with respect to forced labour is recognized as new as well as relatively strong. Several immigration and asylum Acts have been enacted over the years, such as in 1999, 2002, 2006, but the Immigration and Asylum Act of 2004¹⁰ has made trafficking of people for exploitation a criminal offence, including for forced labour. The victims of human trafficking and forced labour are not only women and children; young and teenage boys, adults and elderly people are also victims of forced labour. They are usually trafficked into countries with a higher level of income.

Victims may be trafficked in their country of origin. Human trafficking can also occur when the victims are transported within the same country and forced into labour. This aspect of human trafficking has been ignored by the international legal bodies that have different perspectives. Countries which have a comprehensive approach to human and labour trafficking argue that intent such as coercion and deception cannot be taken as being the only criteria or definition in ascertaining whether forced labour exploitation has taken place.¹¹ During prosecution, the use of coercion and misuse of authority may not be adequately established.¹² In the UK, reported human trafficking

⁹ 'Charities Give Evidence to MSPs on Human Trafficking' (*BBC News*, 3 March 2015) <<http://www.bbc.com/news/uk-scotland-scotland-politics-31704121>> accessed 22 July 2015.

¹⁰ This Act has been partially repealed by Modern Slavery Act 2015 c. 30.

¹¹ James C Hathaway, 'The Human Rights Quagmire of Human Trafficking' (2008) 49(1) *Va J Intl L* 1, 10.

¹² *ibid.*

cases are on the rise, and the court system persists in putting victims on trial. Thus, as a result, the victim is left without justice.

Raymond stated that the term 'trafficking' must be defined in such a manner that the crime can be identified even when there are elements of misleading behaviour and exploitation. She further stated that the UN definition of trafficking is ambiguous and does not specify the meaning that may be implied.¹³ It is by no means necessary that a specific intention and purpose for victim exploitation is present at all times and that the process of trafficking and forced labour exploitation might be very different from the established UN and ILO definitions. An incident outside the bounds of the defined criteria may still constitute an offence of trafficking and forced labour.

The two important aspects that have attracted much attention from researchers are: exploitation, and the means of extracting forced labour. Forced labour and trafficking involves the exploitation of a person in order to extract forced labour. Skrivankova observed that exploitation may not be evident during the initial stages of the trafficking process. However, she states that prosecutors may nevertheless file charges against the offender even if exploitation aspects are not established. The purpose of extracting forced labour may be difficult to ascertain at such a stage. Similarly, exploitation starts from the place the victims originate from and might pre-date the date when transportation takes place. The criminal activity of trafficking and forced labour will occur when the victim is transported from the place of origin.¹⁴ Migrant workers are subjected to forced labour in not only the agricultural sector, but also in construction, food processing, domestic service and food services. The workers are not able to change their employers without losing their immigration status, which leads to exploitation.¹⁵ In addition, Saudi Arabia is the destination for people subjected to forced labour and, to a lesser extent, forced prostitution. People are trafficked to Saudi Arabia from South Central Asia, the Middle East, Africa, India, Nepal, Bangladesh, Pakistan, Burma, and other countries.¹⁶

¹³ Janice G Raymond, 'The New UN Trafficking Protocol' (2002) 25(5) Women's Studies Intl Forum 491-502.

¹⁴ Skrivankova (n 8).

¹⁵ James Finckenauer, 'Trafficking in Persons Report' (2000) 6 Trends in Organized Crime 32-43.

¹⁶ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2014).

New and different methods are used for exploiting immigrants. The same authors take the viewpoint that working conditions along with other factors such as patterns of employment should also be considered when establishing trafficking and forced labour. Low-skilled workers are often more vulnerable to forced labour than those with technical skills. They further observe that 'expectations' tend to be a major element of the exploitation process. This is shown by the example of the Chinese immigrants who have expected to earn a high income in the UK. Research has examined the experiences of 32 Chinese migrant workers, the majority of them working in the catering and hospitality industry. This study was conducted to understand the ways in which Chinese immigrants were controlled in terms of their personal lives and with the threat of facing forced labour. The continuum of exploitation, from proper work to forced labour, was used to observe the extent of forced labour. According to the findings, there were clear aspects of forced labour: all the Chinese immigrant employees experienced retention of wages or very low wages. An exploitation continuum is drawn where 'proper work' and 'forced labour' are perceived to be the two extremes.

Migrant workers have to face many issues and are vulnerable during transit to and when arriving at the place of destination. The exploitation, Carolyn Kagan and others argue, starts as soon as the expectations are shattered. The expectations, upon the basis of which the immigrants decided to leave their home country of China and move to UK, are not met, and this marks the beginning of the exploitation.¹⁷ Researchers have identified loopholes adopted by transnational institutions in framing the crime. Using restrictive and specified terms and scenarios to establish crime only benefits the offenders, leaving needs of the majority of victims unaddressed. There are then, of course, issues in the implementation of the laws in different jurisdictions.

7.3 MEASURES TO COMBAT LABOUR EXPLOITATION IN ISLAMIC LAW

Islamic law prohibits any type of human trafficking and forced labour involving abuse and exploitation. Islam also prohibits debt bondage, which tends to indicate forced

¹⁷ Carolyn Kagan and others, *Experiences of Forced Labour among Chinese Migrant Workers* [2011] (Joseph Rowntree Foundation).

labour. This is because the concept is based on interest (*riba*) and is used for the exploitation of victims.¹⁸ Moreover, the interest on the actual principal amount significantly increases. Victims are not able to pay the principal amount or the high levels of interest, and thus they are forced to work to pay off the debt. Islamic law prohibits any kind of *riba*.¹⁹ In addition, using interest for exploitation of the poor and favouring of the wealthy is strictly forbidden.²⁰ Another reason for prohibition of interest in Islamic law is the element of earning reward without making any effort. As far as KSA law in this regard is concerned, chapter two of the Charter of the Saudi Arabian Monetary Agency (SAMA) asserts that the SAMA has no right to pay or receive any kind of interest. It can only take certain service charges on services delivered to people. Islamic law is strictly followed by Saudi Arabians, which imposes the prohibition of interest.²¹

In the Muslim world, forced labour is a component of human trafficking. Forced labour is typically used for construction, mining, agriculture, and domestic work. Human trafficking, which involves forced labour and slavery, involves fraudulent contracts and false agreements; the workers are promised an attractive wage.²² However, the promises are soon revealed to be false and the workers are forced to work in harsh situations against their will. To make matters worse, the working hours are greater

¹⁸ For other examples of exploitation in national legislation, see Azerbaijan, Law of the Republic of Azerbaijan on the Fight against Human Trafficking, Law No 958-11Q [2005], art 1.0.2.

¹⁹ According to the tradition of the Prophet, 'monopolists are sinners' (reported by Sahih Muslim).

²⁰ Ali Adnan Ibrahim, 'The Rise of Customary Businesses in International Financial Markets: An Introduction to Islamic Finance and the Challenges of International Integration' (2008) 23 American University International Law Journal 661.

²¹ Julian DM Lew (ed), *Contemporary Problems in International Arbitration* (Brill Archive 1987).

²² Earlier conventions defined forced labour, including International Labour Organization (ILO) conventions such as the Forced Labour Convention (1930) and the Abolition of Forced Labour Convention (1957). The Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) (Convention No 182), of ILO (United Nations, Treaty Series, vol 2133, No 37245) in its art 3 prohibits '(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.' See also the Protocol to Convention 29, (Protocol to The Forced Labour Convention, 1930) adopted by the International Labour Conference (ILC) at its 103rd Session, Geneva, 11 June 2014 as the Protocol of 2014 to the Forced Labour Convention, 1930.

than those agreed, and the wages lower than those promised and with restrictions imposed.

Islamic laws clearly prohibit forced labour.²³ The Holy Book of Islam, the Koran, specifies that one must have integrity and be honest in dealings, and that one must not engage in activity which is unjust for others.²⁴ Human trafficking is tackled by the Islamic laws using a different perspective. Employers are responsible for fulfilling their duties and must not, by any means, displease their employees. The law requires both employers and employees to fulfil the contract that has been agreed. On the other hand, if the contract is made under duress (ie where a person enters a contract as a consequence of a threat), the contract can be set aside. Islamic law says that when a person enters into a contract forcefully, then third-party subjective inquiry is mandatory to determine whether the person has accepted the contract because of any threat.²⁵ Moreover, employers are obliged to pay wages on time and as agreed. It is accepted that wages will be delivered as soon as employees render their services.²⁶ In Ireland, several employment legal instruments have been passed which were outcomes of EU membership. Along with others, rights relative to working time, equal pay, timely disbursement, transfer of undertakings, fixed-term workers, and agency workers all stem from European legislation.

Islamic law states that the employee must be told clearly about their salary and reward. The employee must also be informed about any contingencies, policies and restrictions before signing the employment agreement.²⁷

Moreover, Islamic values also prohibit human trafficking and forced labour. Islam states that no form of exploitation is permitted. Islam has frequently warned Muslims against repressing other human beings. Verse 33 in chapter 7 reveals the proscription

²³ Adnan A Zulfiqar, 'Religious Sanctification of Labor Law: Islamic Labor Principles and Model Provisions' (2007) 9 University of Pennsylvania Journal of Labor and Employment Law 421.

²⁴ The Prophet said, 'Give the hired man his wages before his sweat dries' (reported by Ibn Maajah).

²⁵ M Cherif Bassiouni, *Introduction to International Criminal Law* (Martinus Nijhoff Publishers 2012).

²⁶ Zulfiqar (n 23) 421.

²⁷ Al-Mutaqqi al-Hindi, 'The treasure of workers in normative words and deeds', Hadith 9125 (translation from Arabic by Mohamed Y Mattar).

against oppression.²⁸ The religion of Islam also considers the importance of the rights of employees. Agreements between employer and employee must be clearly expressed and valued. Breaking the agreement in any manner is deemed a serious offence. According to Verse 85 in chapter 7²⁹ human beings are ordered by God to provide each other their dues and not to deny each other's rights.³⁰ Moreover, according to Islamic values, every human being is born free and cannot be enslaved. The second caliph of Islam stated that people cannot be enslaved when their mothers gave birth to them as free humans. Once, an Egyptian from the Copts came to the second caliph of Islam, Omar Ibn al-Khattab, to seek refuge from oppression. He complained that he was racing the son of Egypt's governor, Amr ibn al-Aas. After being defeated, the son of Amr ibn al-Aas started beating the Egyptian with a whip claiming that he was the son of nobles. Therefore, Omar ibn al-Khattab sent a written order to the governor of Egypt to appear before him with his son. When the governor of Egypt appeared before Omar ibn al-Khattab with his son, Omar asked the Egyptian to beat the son of the governor with a whip. The Egyptian started beating the governor's son with a whip and Omar told him to beat the son of nobles. This is an example of how Islam gives the rights of equality and freedom.

Honesty and integrity are considered to be the most important virtues in Islam. Agreements, contracts and covenants are considered much more important than mere pieces of paper; they are deemed to be binding upon the parties to the contract.³¹ Fulfilling and adhering to the terms established by the parties is considered a moral act, and agreements are deemed to be of religious importance. Oral contracts are as valid as written contracts, but there will be issues in terms of the proof. Oral agreements can be proven by actions and not just by written words. The phenomenon is further strengthened by a keen focus on earning through legitimate means, and any

²⁸ 'My Lord has only forbidden immoralities - what is apparent of them and what is concealed - and sin, and oppression without right, and that you associate with Allah that for which He has not sent down authority, and that you say about Allah that which you do not know.' AL-A'RAF (33).

²⁹ 'And to [the people of] Madyan [We sent] their brother Shu'ayb. He said, "O my people, worship Allah ; you have no deity other than Him. There has come to you clear evidence from your Lord. So fulfill the measure and weight and do not deprive people of their due and cause not corruption upon the earth after its reformation. That is better for you, if you should be believers.' AL-A'RAF (85).

³⁰ Muhammad Azizul Islam, *Social Compliance Accounting: Managing Legitimacy in Global Supply Chains* (Springer 2014).

³¹ Reported by Isaac in his Musnad, Abdul Razzaq [133].

illegal means of earning such as smuggling and human trafficking are forbidden, and considered illicit.³²

All types of forced labour are prohibited in Islam as they involve exploitation, malpractice and abuse. In Islam, slavery (which means forced labour) is highly criticized, as the Quran clearly promotes widespread independence and human decorum as its perfect society. Islam says that slaves should be freed and female slaves must not be forced into prostitution.³³ Islam reminds Muslims again and again that there is a great reward for those who do not become involved in forced labour. Quran's Verse 70 in chapter 17 underlines the estimable act of freeing a slave.³⁴ Dishonesty, cheating and cruelty are also separately prohibited in the Koran,³⁵ which is significant in the context of this thesis as they are the prime factors that pave the way for human trafficking. Forced labour and exploitation was a common practice among the Arabs before Islam and Koran. After Islam, the Islamic laws and Koran denied and disallowed these practices and stresses that every human is free and no one has the legal or moral right to enslave any human being and force him to work against his will. Severe truthfulness in dealing with others, without deception, is shown in several places in the holy book of Islam. Verse 34 of Surah 17 says: 'Give full measure, when you measure, and weigh with even scales, that is reasonable and superior eventually.' As human trafficking involves exploitation of labour, abuse, and compulsion to work against one's will, it is considered illegal under Islamic laws.

The Koran says, 'O my people, worship ALLAH; you have no other god but Him. Now has come unto you a Clear (Sign) from your Lord. Give just measure and weight, nor withhold from the people the things that are their due; and do no mischief on the earth after it has been set in order: that will be best for you, if you have Faith] (Al-A`raf

³² For instance, employers are encouraged to make the limitations and nature of employment clear to employees in order to motivate honest dealings with them. The holy Koran states: 'O you who believe! Fulfil the obligations' (Surah al Maida, verse 1).

³³ '... And do not compel your slave girls to prostitution, if they desire chastity, to seek [thereby] the temporary interests of worldly life. And if someone should compel them, then indeed, Allah is [to them], after their compulsion, Forgiving and Merciful.' Al-Noor Verse No:33.

³⁴ '... We have certainly honored the children of Adam and carried them on the land and sea and provided for them of the good things and preferred them over much of what we have created, with [definite] preference.' Al-Isra Verse No:70.

³⁵ 'Surely Allah commands you to make over trusts to those worthy of them, and that when you judge between people, you judge with justice.' An-Nisa Verse No:58.

7:85). Furthermore, the Holy Prophet of Islam, Muhammad (peace and blessings be upon him) said, 'Your brothers are your responsibility. ALLAH has made them under your hands. So whosoever has a brother under his hand, let him give him food as he eats and dress as he dresses. Do not give them work that will overburden them and if you give them such task then provide them assistance' (Al-Bukhari). At another instance, the Prophet Muhammad (peace and blessings be upon him) said, 'Give to the worker his wages before his sweat dries (Ibn Majah). This shows the stress laid in Islam for stopping exploitation, forced labour and slavery.

Islamic law does not permit employers to expose their workers to harsh conditions unless they are appropriately rewarded.³⁶ Forced labour involves inflicting hardship upon the victims and is thus denounced by Islam. Accordingly, human trafficking is illegal and prohibited under Islamic law, as it contradicts Islamic values.³⁷

The sponsorship system, the '*Kafala* system', of Saudi Arabia has an inherent element of forced labour. In the *Kafala* system, vulnerable workers are sponsored by employers who act as immigration sponsors. This makes it easier for forced labour to occur.³⁸ The system's weakness is evident because the employee becomes highly dependent on the sponsor, both when moving around within the country and leaving the country. The employee's movement is restricted and the *Kafeel*/sponsor is legally allowed to confiscate the passport of the immigrant employee.³⁹

The sponsorship rule or *Kafala* system is exploitation similar to forced labour. The system confers a large degree of control on the sponsors, who may illegally use it to their undue advantage and compromise the rights of the employees. The freedom and rights of the employees are violated, and pose a threat to the fundamental Islamic principles of freedom.

³⁶ United Nations Children's Fund and Al-Azhar University, International Islamic Center for Population Studies and Research, (2005) *Children in Islam: Their Care, Development and Protection—Summary* 8 <www.unicef.org/egypt/media_2369.html> accessed 22 July 2013.

³⁷ International Islamic University Malaysia 'Fiqh-us-Sunnah' <http://www.iium.edu.my/deed/lawbase/fiqh_us_sunnah/vol2/fsn_vol2b.html> accessed 22 July 2013.

³⁸ Human Rights Watch (HRW) and N Varia, *As If I Am Not Human: Abuses against Asian Domestic Workers in Saudi Arabia* (HRW 2008).

³⁹ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2014).

The use of the sponsorship rule is considered unfair due to the control it exhibits, but it is used by many of the GCC countries. In this policy, employers suspend the official travel documents of the employees, which make it impossible for the employees to change job or to travel. In addition, the employees cannot even leave the country without the consent of their employer.⁴⁰

This sponsorship policy tends to be the reason why workers have to live in such harsh, unrefined and uncomfortable conditions. This is a clear infringement of both international human rights and Islamic rights.⁴¹

The Grand Mufti of Saudi Arabia, on 3 September 2002, passed a *fatwa*⁴² condemning the poor treatment of workers in the country. In addition, the grand *mufti*, being the most senior member of the judicial establishment and person of the highest authority, stated that it is strictly forbidden to intimidate and harass foreign workers and force them to perform work which they (the employer) are not willing to do for whatever reason. Just like other Middle Eastern countries, Saudi Arabia adopts the sponsorship rule, but it has recently been abolished by Saudi Arabia, following the New Foreign Investment Act 2014, in respect of employees who work for overseas investors doing business in Saudi Arabia. There is still a need to extend this change in the law to all foreign employees in the Kingdom. In 2000, the Saudi Council of Ministers' Decree openly provided that a foreign worker is entitled to keep his or her travel documents as well as the travel documents of his or her family. They are allowed to travel anywhere in the KSA without showing documentation (which was previously a requirement). Ensuring that all travellers keep their own travel documents helps to improve the level of security in the Kingdom in general, as all will now be in a position to prove their individuality, and whether they are in the country lawfully, when challenged by law enforcement and security services. The change also ensures that they will be allowed to travel through Saudi Arabia, which is something that was not

⁴⁰ *ibid.*

⁴¹ Nour Abuzant, 'Call for Review of Sponsorship System' (*Gulf Times*, 14 March 2008) <www.gulf-times.com/site/topics/article.asp?cu_no=2&item_no=207225&version=1&template_id=57&parent_id=56> accessed 10 November 2014.

⁴² The meaning of *fatwa* is 'a ruling on a point of Islamic law given by a recognized authority', which is close to *Ijtihad*, as discussed in Chapter 6.

previously allowed by reason of the sponsorship rule.⁴³ They will also be able to freely leave the country, something which should assist in reducing the number of immigrants in the country.

The interpretation of Islam being adopted by the Kingdom is that the sponsorship rule is prohibited in Islam as it results in employers taking undue advantage of the employees, which is a key feature which leads to human trafficking.

The Saudi Labour Ministry's proposal is seen as an initiative for the abolishment of the sponsorship system for all foreign workers, but this extension of the law is currently only a proposal by the Saudi Labour Ministry, and has not yet been implemented. This change would be positive and would encourage other agencies to adopt the same stance. It would also require changes to be made to the Residency Law by the Saudi Government so that the employees do not need to seek permission from their employers to change job or to leave the country.⁴⁴

The KSA's law enforcement efforts against human trafficking are linked to the 2009 Suppression of the Trafficking in Persons Act, promulgated by Royal Decree M/40. It was approved in 2013. It defines and restrains all types of human trafficking, setting out punishments of up to 15 years' imprisonment as well as fines of up to the equivalent of approximately \$266,700 for violations. Penalties can be increased in specific situations, including trafficking committed against women, children, or persons with disabilities.⁴⁵ These penalties are adequately rigorous and proportionate with penalties prescribed for other crimes. As in Kuwait and with other Islamic law-based legal systems, the KSA excludes domestic workers from its labour laws. The KSA passed

⁴³ Mohamed Y Mattar, 'Trafficking in Persons, Especially Women and Children, in Countries of the Middle East: The Scope of the Problem and the Appropriate Legislative Responses' (2003) 26 Fordham International Law Journal 729; Saudi Arabia, Council of Ministers Decision No 166 of 12/7/1421 AH regulating relations between migrant workers and their employers further stipulates that employers are not permitted to withhold the travelling documents of their workers or their families, and they should be allowed to travel as they wish (Council of Ministers Decision No 166 of 12/7/1421 AH (2000) 'Regulating relations between migrant workers and their employers' (Directorate General of the Saudi Border Guard, Media Centre, Statistics) <<https://www.fg.gov.sa/Arabic/MediaCenter/Statistics/Pages/default.aspx>> accessed 22 April 2014.

⁴⁴ Christoph Wilcke is a senior researcher in Human Rights Watch's Middle East and North Africa Division for Jordan, Saudi Arabia and Yemen.

⁴⁵ See further Chapter 6.

a new law to criminalize domestic abuse.⁴⁶ However, the new law has not proved effective, as there were 1,049 cases of domestic violence and child abuse in 2013 in spite of the new family protection laws that were implemented after cabinet's approval.⁴⁷ The investigation by Human Rights Watch into abuses against domestic workers in Saudi Arabia identified cases of forced labour, trafficking, slavery and slavery-like situations.⁴⁸ In 2011 most of the Arab delegates to the International Labour Conference showed support for the adoption of historic international labour standards on decent-quality work for domestic workers. Gulf countries like Saudi Arabia voted for the ILO Convention 189 and Recommendation 2010 on Decent Work for Domestic Workers. It set out that domestic workers (care families and households) should possess the same labour rights as provided to other workers.⁴⁹ Forced labour of all types is forbidden in Islam, and involvement in human trafficking is considered a serious crime. Moreover, Islam is against the notion of cheating, dishonesty and forceful activities, and it cannot be ignored that these factors often lead to human trafficking and other such activities.

7.4 ANALYSIS OF THE ELEMENT OF EXPLOITATION⁵⁰

Human trafficking⁵¹ as defined by the UN Trafficking Protocol and the COE share similar elements: the purported trafficker's act (recruitment, transportation, transfer, harbouring, receipt); the means to accomplish the act (coercion, threat, abduction, fraud, deception, abuse of power, position of vulnerability, transfer/receipt of payments/benefits); and the purpose of committing the act (sexual exploitation,

⁴⁶ Human Rights Watch, 'Saudi Arabia: New Law to Criminalize Domestic Abuse' (HRW, 3 September 2013) <<https://www.hrw.org/news/2013/09/03/saudi-arabia-new-law-criminalize-domestic-abuse>> accessed 27 November 2015.

⁴⁷ Al Arabiya, 'New Law Fails to Curb Domestic Violence in Saudi Arabia' (Al Arabiya News, 26 November 2014) <<http://english.alarabiya.net/en/News/middle-east/2014/11/26/New-law-fails-to-curb-domestic-violence-in-Saudi-Arabia.html>> accessed 29 November 2015.

⁴⁸ A list of domestic workers and their equivalents in Saudi Arabia was issued on 15 July 2013: Ministry of Labour, 'A List of Domestic Workers and their Equivalents in Saudi Arabia' (2013) <http://nshr.org.sa/wp-content/uploads/2013/11/696_PDF.pdf> accessed on 20 April 2014

⁴⁹ Christoph Wilcke is a senior researcher in Human Rights Watch's Middle East and North Africa Division for Jordan, Saudi Arabia and Yemen.

⁵⁰ Allen Buchanan, *Ethics, Efficiency, and the Market* (Rowman & Littlefield 1985) 87; See further S Wilkinson, *Bodies for Sale: Ethics and Exploitation in the Human Body Trade* (Routledge 2003).

⁵¹ See further Chapter 1 section 1.4 above.

forced labour, slavery, servitude, removal of organs).⁵² The three elements must be present for human trafficking to be recognized from an international perspective. Human trafficking from the legal perspective tends to be a combination of the constituent elements. Thus, the presence of all these elements is a notion that the activity must be classified as human trafficking crime. Nevertheless, there is an exception when trafficking in children is concerned. The UN Convention on the Rights of the Child defines a child as being under 18 years of age. Trafficking in children must be present when the child has been subjected to a relevant situation for any of the purposes listed. Whether or not any of the means are used, the act is classified as trafficking. On the contrary, where the victim is an adult, at least one of the listed means must have been used. Under the UN definition, no trafficking (in terms of adults) would be said to have taken place without at least one of the means being applicable. Thus, it is easier to identify child victims of human trafficking than adult victims. In the UN definition, purpose is described using a variety of terms. The UN Trafficking Protocol definition (as cited in article 3) contains reference to factual situations which only become operational in the light of facts cited, and it distinguishes trafficking from other criminal acts like smuggling. On this point, Dempsey and others have argued that in order to make a comparison between the UN Trafficking Protocol and the domestic law definition, it is better to use the term 'object' instead of 'purpose'.⁵³

According to Dempsey and others, using the term 'purpose' instead of 'object' will leave open loopholes for the defendant committing the trafficking offence, and thus the issue of *mens rea* will be relevant.⁵⁴ The term 'object' tends to avoid any issue of *mens rea*, thereby avoiding the possibility of enabling the criminal to find loopholes in the definition.⁵⁵ Moreover, under the UN Trafficking Protocol, trafficking occurs before any exploitation actually occurs.

⁵² Sigma Huda' (20 February 2006) UN Doc E/CN.4/2006/62, p 8 ('Sigma Huda Report').

⁵³ Michelle Madden Dempsey, Carolyn Hoyle and Mary Bosworth, 'Defining Sex Trafficking in International and Domestic Law: Mind the Gaps' (2012) 26 Emory Intl L Rev 137, 145.

⁵⁴ Sigma Huda Report (n 52) 20.

⁵⁵ Dempsey, Hoyle and Bosworth (n 53) note 37, p 145.

Referring to the questions in the introduction of this chapter, the following responses can be inferred. First, international law not only refers to trafficking when an individual is exploited by any means; it includes the continuum of the exploitation. Likewise, not only it is the recruiter, broker or transporter who must be identified as a trafficker, but any person(s) involved by any means in initiating or sustaining the exploitation must also to be classified as a trafficker. Second, the purpose of trafficking has many end results and is not limited to sexual and labour exploitation. The victims involve men, women, and boys and girls of any age. Third, from the legal perspective, trafficking can take place within a single country, which may also include the victim's own country. The recruitment and transfer of persons by means of threat or use of force or other types of coercion, or giving and receiving benefits to obtain the consent of a person to have control over that person for the purposes of exploitation, the exploitation should include at a minimum the exploitation of prostitution of others, other types of sexual exploitation, forced labour slavery, and servitude. However, for persons under 18 years of age or who have not reached the age of consent cannot consent, and consensual child trafficking is not possible from a legal perspective as long as the aim is exploitation. This is why correctly identifying children who have been victims of trafficking is very important.

Though the consensus tends to fit in a single paradigm regarding what exactly constitutes trafficking, the definitional controversies still exist. A major criticism has been the lack of awareness about the international legal understanding. It has been argued that the defined elements are obligatory without any consideration being given to the actual exploitation taking place.⁵⁶ Furthermore, the definition is criticized for containing the requirement that in the case of adult victims, the 'action' leading to exploitation must be linked to defined means such as coercion, deception, or abuse of authority.⁵⁷

When it becomes apparent that the victim has been misled and exploited, the definition of trafficking tends to be raised *de facto*. However, Gallagher highlighted that cases of trafficking involving adults require more insight and consideration than

⁵⁶ Hathaway (n 11) 10.

⁵⁷ *ibid* 11.

just the act as defined by the UN Trafficking Protocol, and the purpose of exploitation must be identified too. Action leading to exploitation must be supported by specified means.⁵⁸ Thus, it seems that, under this definition, trafficking retains a focus on the process and actions rather than the results and actual exploitation.

The question then arises as to what extent the two features of the definition are functional, their scope, limit and legal bounds. Although member states are not required to address the exploitative practices referring to the end purpose of trafficking as contained in the UN Trafficking Protocol and the COE Trafficking Convention, it is apparently difficult to identify private exploitation that does not fall within the defined boundaries of the practice.⁵⁹ It is also very difficult to identify an exploiter circumventing the definition beyond the boundaries of exploiting a person and maintaining that exploitation.⁶⁰ Yet, it may be argued that there are certain instances that technically fall within this definition i.e., the familiar attitude of debt bondage systems common with South Asian countries, which results in trafficking by way of transporting, harbouring/receiving and also transferring individuals using the 'means' of coercion to serve the 'purpose' of labour exploitation through these debts. Moreover, the attitude of selling children for prostitution by the family also falls under the same international legal definition, since the action involves recruitment, transporting, transfer and harbouring in order to exploit them. What is worthy of note here is that in this case of children trafficking, the requirement of 'means' does not need to be fulfilled.⁶¹ Here, one relates these aspects to the nature of human trafficking that takes place in the KSA where men and women are harboured and received by the offenders using the means of coercion, threat and fraud in order to exploit them for different purposes.⁶²

One of the challenging questions that needs to be answered is how exploitation forms an important element of trafficking. According to Piotrowicz, the element of

⁵⁸ Anne T Gallagher, *The International Law of Human Trafficking* (CUP 2010) 47.

⁵⁹ *ibid.*

⁶⁰ *ibid.*

⁶¹ UN Trafficking Protocol, art 3(c).

⁶² HRW and Varia (n 38).

subsequent exploitation must be present for the act to be classified as trafficking.⁶³ This viewpoint is problematic in practicality as any person who is trafficked is not necessarily exploited, especially when the law enforcement authorities intervene in order to assess the action in the destination state.⁶⁴ Similarly, taking the perspective of Piotrowicz, an act of abusing human rights, transportation, transferring, harbouring or reception might not be considered as trafficking if there has been no exploitation.⁶⁵

Another approach as defined in the UN Trafficking Protocol takes the perspective where the intention to exploit is seen as a necessary element of human trafficking. The phrase 'for the purpose of' is in agreement with this interpretation. A *mens rea* requirement is introduced with this phrase into the trafficking definition, whether labour exploitation happens immediately or in the future. Human trafficking would then be said to have occurred if the offender intended that at least one of the listed actions would result in one of the listed purposes. Similarly, Gallagher asserts that whether exploitation occurs or not, the intention to exploit in any of the listed ways is sufficient a signal and is evident from behaviour.⁶⁶ This suggests that bringing a person into an exploitative situation and maintaining it is an offence.⁶⁷ The relationship between the victim and the offender can be either direct i.e., where the victim is recruited or moved and the exploitation upheld, or it can be indirect i.e., where the victims are brought to a destination country and sold to traffickers. Despite the fact that the relationship with one trafficker ends when the victim has been sold to another trafficker, the exploitative relationship or the situation is deemed continues even if the trafficker changes. The most common attitude of traffickers is to usually maintain

⁶³ Ryszard Piotrowicz, 'European Initiatives in the Protection of Victims of Trafficking Who Give Evidence against Their Traffickers' ((2002)) 14(2) Intl J Refugee Law 263, footnote 10, p 266. However, Hathaway suggests that the UN Trafficking Protocol does not equate exploitation with trafficking, and that it is concerned only with forbidding forms of dealing that would lead to or assist in exploitation. He says that 'there is, in consequence, no obligation flowing from the Trafficking Protocol to do anything about the condition of being exploited, much less to provide a remedy to exploited persons': Hathaway (n 11) 10.

⁶⁴ Tom Obokata, *Trafficking of Human Beings from a Human Rights Perspective: Towards a Holistic Approach* (Martinus Nijhoff 2006) 20.

⁶⁵ *ibid.*

⁶⁶ Gallagher (n 58) 34.

⁶⁷ UNODC, *Toolkit to Combat Trafficking in Persons* (UNODC 2008) 199.

control of the victim, and thus will await until their arrival at the destination.⁶⁸ As stated earlier, many trafficking syndicates are organised in a way that the victim is perpetually controlled by the trafficker through debt bondage contracts, and are forced to repay a false debt that is disguised as transportation and placement costs.⁶⁹ In most instances, such bondage prevail as the victims do not possess adequate knowledge or skill to seek assistance.⁷⁰ Taking into account the question of *mens rea*, this research links trafficking to the *purpose* rather than the result of the trafficking.⁷¹ Hence, the proposition of this research is to look at the concept of trafficking from a broader context that includes any of the the listed actions adopted by the UNODC for identifying trafficking as a crime of *dolus specialis*, the term implying the meaning of the purpose aimed by the offender when committing the offence of trafficking.⁷² This means that that the execution of the planned exploitation does not need to take place. For example, cases may arise where the required *mens rea* cannot be established in view of a recruiter or a transporter who can reasonably deny the knowledge of the end purpose. In the case of adults, there might not be difficulty in inferring the intention as the recruiter or transporter might be aware of the purpose of movement, or a subordinate relationship can be used to infer the intention. However, in the case of children, it is a cause of concern as the purpose of movement is only known to the parents, guardian or relatives. Therefore, actual exploitation may not necessary be the defining element for human trafficking, especially taking the context of the the human trafficking definition. All that is required is that the accused has committed any of the listed acts, using the listed means of purpose, or from another perspective, done so with the intent of exploiting the victim. Therefore, human trafficking may take place even before the victim's actual exploitation.⁷³

⁶⁸ Mary De Chesnay, 'Sex Trafficking as a New Pandemic' in Mary De Chesnay (ed), *Sex Trafficking: A Clinical Guide for Nurses* (Springer 2012) 5.

⁶⁹ Bernadette Mcsherry and Susan Kneebone, 'Trafficking in Women and Forced Migration: Moving Victims Across the Border of Crime into the Domain of Human Rights' (2008) 12(1) Intl J Hum Rts 67, 72.

⁷⁰ UNHCR, Guidelines on International Protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking on Persons at Risk of Being Trafficked, (7 April 2006) HCR/GIP/06/07, para 10, p 5.

⁷¹ Rijken (n 4) 57-61.

⁷² Furthermore, the Report is noticed that domestic legislation could allow *mens rea* to be established on a lesser standard than direct intent; *ibid* 5-6.

⁷³ COE, Explanatory Report on COE Trafficking Convention, para 87.

Another issue which is complex in determining human trafficking is the timing of the intent to exploit. It is evident that the exploitative intention might be upheld by a final exploiter or a recruiter, carrier or broker in the early stages. This brings the question of the third element of the definition – ‘intent’ – and that it is only limited to the early stages of the trafficking cycle.⁷⁴ Although there may be different arguments as to when trafficking begins, the correct interpretation should be to identify ‘intent’, which often occurs at the early stage of the trafficking cycle, that is, at the time of recruitment, but also at the point of transport or receipt.⁷⁵

7.5 THE ELEMENT OF EXPLOITATION IN KSA LEGISLATION

Saudi legislation adopts the same terminology as the UN Trafficking Protocol regarding the issue of criminalization of the offence of human trafficking.⁷⁶ Analysing the KSA 2009 Trafficking Law definition of trafficking by commentators,⁷⁷ trafficking has three elements – action, means and purpose. However, under the KSA 2009 Trafficking Law, human trafficking is divided into three elements: the subject of the offence (humans), the physical element (actions and means), and the mental element (purpose). The subject and physical element are not problematic in terms of applying the law against the traffickers. This is because they are obvious and do not require further research as long as the factor of recruitment or transport is present. In contrast, the mental element is where the contradiction comes in, especially when the circumstances are not well identifiable. According to Qorari, the KSA law requires special *mens rea* so as to

⁷⁴ Gallagher (n 58) 34.

⁷⁵ Nicola Piper, ‘A Problem by a Different Name? A Review of Research on Trafficking in South-East Asia and Oceania’ (2005) 43(1/2) *International Migration* 203, 222.

⁷⁶ The laws of the Kingdom of Saudi Arabia add two further elements to the UN definition of exploitation. These two elements are begging and medical experiments. (The KSA 2009 Trafficking Law, 2009) <www.protectionproject.org/wp-content/uploads/2010/09/Saudi-Arabia_TIP-Law_2009_Combined.pdf> accessed 24 October 2012.

⁷⁷ Art (1) a) Trafficking in Person: ‘recruiting, transfer, transferring, or receiving persons [action] and Art (2): ‘Prohibits trafficking in any person in any form including forcing, threatening, defrauding, deceiving, kidnapping him/her. Prohibiting exploiting position, authority, exploiting a person’s weakness, or giving person money or benefits to gain approval of one person to control another person [means] for the purpose [purpose] of sexual assault. Prohibits forced work or service, begging, services, slavery or practices similar to slavery, servitude or the removal of organs or medical experiments.’

relate to the intent of the trafficker where exploitation is the ultimate intent.⁷⁸ Furthermore, trafficking is not seen to be legally, unless the three elements are present including the special *mens rea*. This suggest that under the 2009 Trafficking Law, exploitation is not linked only to the physical elements but also the mental elements of trafficking.⁷⁹ This legal issue casts problems when deciding whether to file a case in court. Many perpetrators of forced labour acts have been arrested where the authorities have been unable to prove the purpose of exploitation. This research therefore concludes that the approach by KSA is problematic, because by making all the three elements to be concurrently for the establishment of human trafficking offences, investigation and prosecution process becomes very difficult, especially in terms of determining 'intent'.⁸⁰ This situation becomes particularly problematic in cases of child trafficking. For example, this research has shown earlier that while knowledge should be the main element in the recruitment and transportation of child victims, where only the parents/guardians and traffickers retain the knowledge, determining the intention to exploit if the case was discovered by another State may result in insufficient transactional law enforcement and prosecution cooperation. Hence, the explanation of this researcher is to retain the notion and purpose of exploitation as provided in the UN Trafficking Protocol in order not to make the cause of investigation and prosecution difficult.

Principally, the intention is often present before a victim is subjected to trafficking and exported to the destination state. Once the exploitation has occurred, the *mens rea* or the intention to exploit has turned into reality. The position under the KSA Trafficking Law, that traffickers will not be prosecuted unless proven guilty of actual exploitation or only if exploitation was the ultimate intention of the trafficker is an obstacle to the fight against THB.⁸¹ Moreover, the notion that if the purpose is not clear during the early stages, will lead to a lack of one of the elements of the crime, and thus the crime

⁷⁸ FM Qorari, 'Criminal Confrontation for Human Trafficking Crimes: A Comparative Study' [2009] Journal of Sharia & Law 1608, 208.

⁷⁹ *ibid.*

⁸⁰ Aadil Majed, *Combating Human Trafficking Crimes in International Conventions and National Law* (Institute of Training and Judicial Studies 2007) 107.

⁸¹ Royal Decree No M/40 of 2009 (Law for Combating Crimes of Trafficking in Persons), Um Al-Quaran, art 2 (Saudi Arabia) <www.protectionproject.org/wp-content/uploads/2010/09/Saudi-Arabia_TIP-Law_2009_Combined.pdf> accessed 27 March 2013.

will be said to be absent is quite problematic. Another major problem is that in this kind of scenario, reliance is made on other crimes in order to obtain a conviction, which may lead to the 'victim' also being prosecuted. Conversely, police in the UK utilize different means of combating trafficking such as prevention of the crime, disruption through dissemination of criminal networks. These perhaps are measures that do not wait for the crime to be continuously perpetrated until real exploitation can be established. Instead, they are both preventative and deterrence measures. The CPS which is the main public prosecution service for England and Wales uses disruption, deterrence, examination and prosecution instruments to deal with THB.⁸²

Relating back to the approach in the KSA, it technically means that traffickers may not be prosecuted when there is lack of evidence of exploitation. As a result, the traffickers will be immune from prosecution despite carrying on the trafficking activity, as the *mens rea* element of labour exploitation will not be identifiable. As long as knowledge is considered the most important element in proving the intention to exploit, investigating authorities need to judge this from the characteristics and circumstances surrounding a case. The KSA should be required to reword the definition of human trafficking without the need for specific proof of the presence of the exploitation element and so that committing any of the listed actions (recruiting, transporting, transferring, receiving) by using listed means (threat, use of force, other forms of coercion, kidnap, fraud, deceit, abuse of power, exploiting weakness, bribing for trafficking, giving or receiving benefits to obtain control of a person) with the special *mens rea* that exploitation is likely and can be inferred from the circumstances, will be sufficient and that the penalty will be stricter if the intent to exploit is related thereto, which would fit more with the Islamic laws as provided in the above mentioned verses and hadiths.

This researcher has stated that the KSA 2009 Trafficking Law should focus on proving intent to exploit, especially in the cases when investigators are unable to find the intent to exploit despite the occurrence of a physical element.⁸³ This is necessary if

⁸² CPS, CPS Policy for Prosecuting Cases of Human Trafficking (2011) <https://www.cps.gov.uk/publications/docs/policy_for_prosecuting_cases_of_human_trafficking.pdf> accessed 12 August 2015.

⁸³ Royal Decree No M/40 of 2009 (n 73).

there is to be an objective balance in ensuring that victims are protected and offenders adequately prosecuted. This should be a position that KSA should deeply consider whether it follows international human rights law or Islamic individual rights principles.

It is important to state that the general principle of criminal justice is that the trafficker (the defendant) is innocent unless and until determined otherwise. However, in cases of THB, there are certain considerations that have to be put in place because a stringent application of this principle may mean that, in many instances, it would be too late to protect the victims. As will be discussed in the later part of this chapter, there is the need to balance these principles with the realities of THB. Principally, the current KSA law is heavily weighted in favour of the defendant (trafficker). What would restore this balance is adopting the notion of presumed exploitation, where other evidence points in this direction, even where the actual evidence of exploitation is missing.

It is the viewpoint of the researcher that when a person commits one of the trafficking offences set out in the KSA 2009 Trafficking Law, the criminal intent of human trafficking is present without needing to identify the details of the exploitation.⁸⁴ As long as the action has been performed using the defined means, the offence should be considered as have taken place unless proving otherwise. Although this standpoint is vulnerable to criticism due to the inclusion of those who are bona fide, it is practical from the view that criminal intent can be established through the particular circumstances of each case. Unwitting participants are to be excluded from the trafficking process unless and until they are in possession of knowledge of what is going to happen with the victims. These participants may include recruitment agents, domestic work agencies, and transport drivers. However, they may aid the process of trafficking by playing the role of middle man.

Distinction between these two types of people can be made through the circumstances – for example, the involvement of a large sum of money (some received in the country of origin and some in the country of destination), false advertising, fake promises made by the contractor, and physical/emotional torture. These instances are

⁸⁴ *ibid.*

an indication of exploitation. The researcher believes that determining the form of exploitation is not important as long as the purpose of the action can be clearly linked to the victim being subjected to coercion, deception, fraud, or control.

Moreover, the relationship between the traffickers and victims supports the viewpoint of the researcher. In many occasions, the victims are unaware of the main traffickers or the ultimate beneficiary, and thus arresting that unknown person is a challenge. Adopting the viewpoint of the researcher would lead to prosecution or arrest of at least those who are involved by any means in planning the trafficking activity; otherwise, all of those involved in the chain would be left out (including the participants and the main beneficiaries) unless the intent can be proved. Thus, this procedure would be a strong warning for all those planning to use the KSA territory as a country of transit between the originating and destination countries which do not consider transport, transfer, or trafficking a crime.

When exploitation is complete and then revealed, it acts as an aggravating circumstance to be considered when deciding the punishment. Two factors are relevant to the non-definitive proof of criminal intent of human trafficking.⁸⁵ First, both the acts and means are unknown. Second, the traffickers are unaware of any exploitation that will take place. However, the situation indicates the exploitation activity. Even though the traffickers are aware of the exploitation, the exploitation itself may take different forms, making it difficult to prove. This is why human trafficking must be subject to rigorous prosecution irrespective of whether the investigators are able to find satisfactory evidence regarding the form of exploitation. Hence, it should not be made a crucial element that intent must be proved in specific terms. Instead, as long as the person has been trafficked and there is an indication of the intent of labour exploitation, there should also be room for appropriate investigation and prosecution. The *mens rea* should therefore be established from the circumstances.

Any victim that is subject to any of the elements of THB should be deemed a victim whose rights should be protected even if the actions of the defendant in themselves

⁸⁵ Qorari (n 78) 208.

do not constitute an attempt to exploit. However, this notion is subject to question where there is absence of lack of intent to exploit, hence, the difference between trafficking and smuggling is not easily made. The researcher believes that the only distinction to be made is from the circumstances surrounding each case, because trafficking and smuggling have different contexts when it comes to the intent to exploit. For example, this study has shown in Chapter 3⁸⁶ how victims are exploited in the country of destination and the degree of exploitation might only be evident after the victim's arrival, meaning that the means of trafficking and smuggling might be the same. It is therefore necessary to look at THB for its dynamic features and ascertain how the exploitation is linked to trafficking. Thus, the significance of international cooperation in joint investigations and information exchange in human trafficking offences is highlighted.⁸⁷

7.6 THE ELEMENT OF EXPLOITATION IN UK LEGISLATION

There is harmony on the essence of human trafficking between the legislation of the three main jurisdictions of the UK, the UN Trafficking Protocol, the COE Trafficking Convention and the Council of European Union Directives and Decisions. The Modern Slavery Act 2015,⁸⁸ the human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, the human Trafficking and Exploitation (Scotland) Act 2015, the Protection of Freedoms Act 2012 and the Asylum and Immigration Act 2004,⁸⁹ emphasize the issue of prevention and prosecution of traffickers. However, these laws do not separately define human trafficking. Nor do they specify the required elements that must be present for the human trafficking offence. For instance, section 2 of the Modern Slavery Act 2015, which was enacted in June 2015,⁹⁰ c. 30 states:

⁸⁶ See further Chapter 3 section 3.3 above.

⁸⁷ Christoph Wilcke is a senior researcher in Human Rights Watch's Middle East and North Africa Division for Jordan, Saudi Arabia and Yemen.

⁸⁸ The Modern Slavery Act 2015 (c 30) came into force in 2015.

⁸⁹ Immigration Act 2004 section 4, this version partially in force from 31 July 2015.

⁹⁰ Matthew Howse, the UK Modern Slavery Act 2015' (*The National Law Review*, 8 October 2015) <http://www.natlawreview.com/article/uk-modern-slavery-act-2015> accessed 29 November 2015.

- i. A person commits an offence if the person arranges or facilitates the travel of another person ('V') with a view to V being exploited.
- ii. It is irrelevant whether V consents to the travel (whether V is an adult or a child).
- iii. A person may in particular arrange or facilitate V's travel by recruiting V, transporting or transferring V, harbouring or receiving V, or transferring or exchanging control over V.
- iv. A person arranges or facilitates V's travel with a view to V being exploited only if;
- v. The person intends to exploit V (in any part of the world) during or after the travel, or
- vi. The person knows or ought to know that another person is likely to exploit V (in any part of the world) during or after the travel.⁹¹

This definition is free from the ambiguity that was present in the KSA legislation. The UK legislation does not find it necessary to specify the purpose or extent of trafficking in order to punish the traffickers.⁹² Definitive evidence is not deemed necessary as it can be inferred due to the use of the term 'belief',⁹³ the researcher interprets this term as being the probability that exploitation will occur, making it sufficient evidence for prosecuting and it would be for the defendant to rebut this presumption at a trial. The *mens rea* is present here, and if a person commits the trafficking activities listed in the European Trafficking Convention, he/she can be prosecuted and convicted. The legislation of the three main jurisdictions of the UK further clarifies the term 'exploitation' in regard to trafficking offences.

Thus, the Modern Slavery Act 2015 do not require the three elements of trafficking (action, means and purpose) as laid down in the UN Trafficking Protocol or the European Trafficking Convention, to convict the traffickers. Moreover, the basic difference in the definitions is that the legislation of the three main jurisdictions of the UK does not require the elements of violence or coercion in the act of transportation as long as 'transfer' and 'intent' to commit a 'relevant offence' can be proved.⁹⁴ Nonetheless, the Protection of Freedoms Act 2012 c.9, s 109 states: 'a person commits an offence if he intentionally arranges or facilitates the arrival in, travel within or

⁹¹ Modern Slavery Act 2015 (c 30), s 2.

⁹² See also Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, s 2 and Human Trafficking and Exploitation Act (Scotland) 2015, s 1.

⁹³ Modern Slavery Act 2015 C30, s 50.

⁹⁴ Sandhya Drew, *Human Trafficking - Human Rights: Law and Practice* (Legal Action Group 2009) 95.

departure from the UK'.⁹⁵ This gives rise to a problem of defining the boundaries of human trafficking because it has an impact on the trafficking offenders and the construction of trafficked victims.

The Modern Slavery Act 2015 (section 2), the human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 (section 2) and the human Trafficking and Exploitation (Scotland) Act 2015 (section 1) are further examples from the legislation of the three main jurisdictions of the UK which define trafficking as an offence when intentional arrangement or facilitation of the entry, travel within or departure from the UK have been made with the intention to exploit directly or indirectly. Both sections have the objective of targeting all those involved in the human trafficking process. Similarly, the Human Trafficking and Exploitation 2015, section 2 (in force)⁹⁶ states: 'A person ("A") commits an offence if A arranges or facilitates the travel of another person ("B") with a view to B being exploited.'

The term 'arranges or facilitates' is clear. Furthermore, the Human Trafficking and Exploitation (Scotland) Act 2015, s 4 (not yet in force)⁹⁷ does not use the term 'arranges or facilitates'. Rather, it states that a person commits an offence if:

- (a) the person holds another person in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is so held, or
- (b) the person requires another person to perform forced or compulsory labour and the circumstances are such that the person knows or ought to know that the other person is being required to perform such labour

The term 'knows or ought to know' makes it clear that the knowledge of compulsory labour and exploitation also counts as an offence. According to these sections, the intent to exploit is not required. The offence is said to be committed if a defendant possesses knowledge by any means that the person is susceptible to exploitation. Thus, the *actus reus* (the physical element) involves arranging or facilitating

⁹⁵ Protection of Freedoms Act 2012 c.9, s 109 (Repealed by Modern Slavery Act 2015 c. 30 Sch.5(1) para.9(2).

⁹⁶ Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, s 2 (in force).

⁹⁷ Human Trafficking and Exploitation Act (Scotland) 2015, s 4.

recruitment, transport or transfer, and the *mens rea* (the mental element) is the intent to exploit or the belief that someone else will exploit.⁹⁸

The two elements considered in the commission of human trafficking crime⁹⁹ are the action element (arranging, facilitating travel into, within, or out of the UK) and the purpose element (intent to exploit). Thus, for the purpose of the offence, exploitation is the underlying characteristic of both the acts. Section 3 of the Modern Slavery Act 2015 outlines what is meant by exploitation: 'Slavery, servitude and forced or compulsory labour, Sexual exploitation, Removal of organs etc, Securing services by force, threats or deception and Securing services from children and vulnerable persons'.¹⁰⁰ Also, engaging behaviour contravening article 4 ECHR prohibiting slavery or forced labour; encouraging, demanding or expecting the passenger to proceed to an act which would mean commission of offence concerning organ removal; forcing threatening or deceiving the passenger to provide services of any kind; enabling someone else to acquire the benefits or inducing a passenger to do something due to an inherent disability that a normal person would likely refuse to do.¹⁰¹ *Inter alia*, it provides that arranging and facilitating is committed if the trafficker intends to exploit the passenger, or possesses knowledge of any exploitation that might take place otherwise once the victim has arrived, entered or departed from the UK, or for that

⁹⁸ Home Office, 'Home Office Circular 069/2004 Asylum and Immigration (Treatment of Claimants, etc.) Act 2004: Trafficking Offences Broad subject: Terrorism and Organised Crime' (GOV.UK, 23 November 2004)

<<https://www.gov.uk/government/publications/asylum-and-immigration-treatment-of-claimants-etc-act-2004-trafficking-offences>> accessed 14 January 2013.

⁹⁹ However, Siripatthanakosol divided the trafficking offence according to the AICA 2004 into three elements: '(1) arranges travel into, within or out of the UK by a person with the belief or if he believes that the person has been brought into the UK to be exploited, and; (2) intends to exploit that person or; (3) believes that another person is likely to do so': Kuanruthai Siripatthanakosol, 'Human Trafficking for Sexual Exploitation: The Framework of Human Rights Protection' (DPhil thesis, Newcastle University 2010) 203.

¹⁰⁰ Meaning of exploitation in the Modern Slavery Act 2015 c 30, s 3.

¹⁰¹ '1. No one shall be held in slavery or servitude; 2. No one shall be required to perform forced or compulsory labour; 3. For the purpose of this Article the term "forced or compulsory labour" shall not include: (a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article [Right to liberty and security] of this Convention or during conditional release from such detention; (b) any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service; (c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community; (d) any work or service which forms part of normal civic obligations.' Under this subsection, further guidance on what constitutes servitude and forced and compulsory labour can be found, as seen in Chapter 2 in the ECtHR case of *Siliadin v France*. The ECtHR unanimously held that there had been a violation of article 4 of the ECHR.

matter, any country. Under the new subsection 1C, the exploitation could take place during or after the journey.

An inference or interpretation can be obtained from the circumstances of movement for the purposes of trafficking. In *Regina v K*,¹⁰² the defendant was accused of trafficking an individual into the UK for the purpose of exploitation. The victim was brought to the UK from an African state to work as a labourer in exchange for monthly wages. The defendant was arrested after a complaint from the victim about forced labour and ill treatment. She had to work all day and be available to work 24 hours a day. The allowance was £10 per month with another payment of £27 credited to the African bank account. It was effectively proved that the defendant had the intention of exploiting the victim when arranging or facilitating her arrival in the UK, and that this could be inferred from various factors. The defendant essentially arranged for her recruitment by asking one of the employees to send her to UK and to arrange her passport, visa and tickets as well as a bank account in the country of origin. The intention to exploit was evidenced by the low pay, extensive working hours and the degree of control, as well as the continued ill treatment.¹⁰³ Thus, this case fell within the scope of article 4 on the prohibition of 'slavery or servitude' and on the prohibition of 'forced or compulsory labour' under subsections (1) and (2) of the ECHR and under section 71 of the CJA 2009.¹⁰⁴

Such circumstances can be used as a reference point for identifying exploitation in the KSA, indicating that a person is held for the purpose of exploitation. Coercion or deception can be demonstrated through different behaviours that can serve as evidence of the intent to exploit. Examples include: forcing or threatening behaviour by the employer; intimidating behaviour against the family; threatening to reporting to competent authorities for any irregular activity of migrating; confiscating documents; restricting movement; and implementing debt bondage.

¹⁰² *Regina v K* [2001] UKHL 41.

¹⁰³ *ibid.*

¹⁰⁴ CPS, 'Legal Guidance of Human Trafficking and Smuggling' (CPS) <http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/#a13> accessed 15 January 2014.

Other factors that may indicate forced labour include: lack of proper information provided to the worker; excessive working hours; poor wage rate; ill treatment; poor and hazardous working conditions; lack of formal employment contract; poor living conditions and accommodation; and isolation from other workers.¹⁰⁵

Physical torture is not always the only signalling element that a victim has been exploited; there are cases where the victim has been psychologically and coercively exploited.¹⁰⁶ Immoral terms and conditions which are against human dignity are the factors reflecting exploitation and compulsion to work. For instance, victims may have been subjected to abuse without any physical violence like identification documents confiscated. A debt bondage relation can be established from having high accommodation rent, which is made a compulsory part of the employment. Therefore if a trafficked victim leaves a job, he/she loses the accommodation. More precisely, these victims can be called prisoners of their circumstances, even though they might be free from any physical harm, as determined in the case of *Siliadin*.¹⁰⁷

Such circumstances prove the intent to exploit where the offence of human trafficking is established in the early stages. It is not necessary that the exploitation has occurred with a victim; it is sufficient if it has been established that a person has been subjected to any of the listed activities by any of the listed means. Hence, the trafficking offence is present before the actual exploitation occurs, and subsequent exploitation will mean aggravation of circumstances. The researcher is of the view that trafficking occurs even when there is non-exploitation of the victim or there is lack of proof of specific intent. Adopting the principle of *probability* of exploitation must be in lieu of the presumption of exploitation according to the prevalent circumstances and acts against the victim. Thus, those who act in bad faith must also be prosecuted, otherwise the trafficker will be free from blame and punishment unless international investigations are carried out.

¹⁰⁵ *ibid*, 'Legal Guidance of Slavery, Servitude and Forced or Compulsory Labour'.

¹⁰⁶ *ibid*.

¹⁰⁷ See further discussion in this case in Chapter 1 section 1.3 above.

7.7 COMPARATIVE ANALYSIS OF THE KSA AND THE UK

Having analysed the legislation of both states in detail, it becomes apparent that both agree on the presence of the *mens rea*, or the intent to exploit, for human trafficking to occur. But looking at the statutes in the UK and the laws in the KSA, the elements needed to prove THB differ. According to the legislation of the three main jurisdictions of the UK, the offence is deemed as being committed even without exploitation as long as the aim of arranging or facilitating the transfer into, within, or out of the UK is to exploit the victim. The use of the term 'belief' in different Acts supports this view. *R v SK* also confirms this view, where the intent to exploit was proved before the victim was transported to the UK.¹⁰⁸ The legislation of the three main jurisdictions of the UK has a broad vision in recognizing the transporter, arranger, or facilitator as having the belief in instances of possible exploitation, as evident from the use of phrase 'believes that another person is likely to exploit'. The belief can be inferred from the circumstances of the defendant. In contrast, the 2009 Trafficking Law of the KSA was clear that the intent to exploit is the basic element to prove the offence of human trafficking.¹⁰⁹ This is because the law that defines trafficking links the mental element to the listed means used for committing trafficking (physical element). If only the physical element is committed in accordance with *mens rea* as described in the domestic judiciary, no trafficking will be said to have been committed. This loophole in the KSA suggests that recruiting a person in a country of origin using fake promises or debt bondage does not constitute human trafficking offence if the intent to exploit is unknown or not proved. The same applies where there is only a suspicion of exploitation, as the KSA legislation does not adopt the principle of probability like the legislation of the three main jurisdictions of the UK. Thus, it becomes difficult to combat THB in KSA as one has to prove actual exploitation has occurred, or physical evidence of forced labour is obtained.

The legislation of the three main jurisdictions of the UK are more proactive in dealing with the nature and dynamics of THB. For example, the Modern Slavery Act 2015 s(4), states that the offence is deemed to have been committed if it has been intentionally

¹⁰⁸ *R v SK* [2011] EWCA Crim, para 38.

¹⁰⁹ Royal Decree No M/40 of 2009 (n 73)

arranged or facilitated with the usage of phrase ‘intent to commit’ or a knowledge or ‘belief that another person is likely to do something’ and that exploitation is likely to occur. The Human Trafficking and Exploitation (Scotland) Act 2015, section 1¹¹⁰ states that a person commits an offence if the person takes a relevant action ‘with a view to another person being exploited’. This represents the intention of exploitation in the relevant action. Furthermore, in section 4 of the Human Trafficking and Exploitation (Scotland) Act 2015,¹¹¹ the offence of slavery and forced labour is committed if ‘a person the person knows or ought to know that the other person is being required to perform such labour’, which considers the knowledge of the crime as a crime. Similarly, it is an offence of slavery, servitude and forced or compulsory labour in section 1 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 if ‘A knows or ought to know that B is held in slavery or servitude’¹¹². In addition, under section 2 of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, the offence of human trafficking is deemed to be committed if ‘A arranges or facilitates the travel of another person B with a view to B being exploited’¹¹³. Therefore, the offence is committed in cases of intention, facilitating and having belief or knowledge of the crime.

Two methods are proposed by the researcher so as to address the legal loopholes in the KSA 2009 Trafficking Law. The first is to adopt the notion of presumed exploitation. The second is to adopt the principle set out in the legislation of the three main jurisdictions of the UK, namely, the belief of exploitation, which is more accurately the degree of probability that exploitation will occur. Thus, in the criminal justice jurisprudence, such a presumed intention is regarded as ‘reverse’ presumption, which suggests that the prosecution only needs to prove certain elements in the transaction or transaction of an offence for the burden to be shifted on the defence to prove his or her innocence. These are principles that do not occur for most criminal cases but in the area of THB, they are jurisprudentially justifiable because of the nature of THB. It was

¹¹⁰ Human Trafficking and Exploitation Act (Scotland) 2015, s 1.

¹¹¹ *ibid* s 4.

¹¹² Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, s 1 (in force).

¹¹³ *ibid* s 2 (in force).

also regarded as a justifiable procedural way of prosecution, where it was used to pursue legitimate aim. The ECtHR upheld this method and also states that it does not contravene Article 6 of the ECtHR. On this principle of reversals of legal burdens, some scholars argue that it leads to the accused been presumed guilty. However, “the Strasburg jurisprudence and the English authorities agree that Article 6(2) does not state an absolute rule”.¹¹⁴ This was further illustrated in the case of *Salabiaku v France*,¹¹⁵ 16 Where on appeal, the ECtHR found that shifting the burden on the defendant does not breach of the Convention as there was strong presumption of guilt on the defendant for the possession of drugs in such situations.

As seen throughout this research, the acceptance by UK legislation of the probability rule give more room for the protection of the victims of trafficking from exploitation even during the initial stages of the process. Moreover, the UK appears to have adopted an approach that considerably improves protection for victims, equips law enforcement with the tools required for targeting today’s slave drivers, and ensures that the perpetrators can be appropriately punished.

In contrast to what is found in the UK, the researcher believes that the KSA legislation for dealing with THB is unable to deal with the problem raised by the probability issue as it requires a definitive intent to exploit or, specifically, special criminal intent. To achieve this KSA should as well take consideration of article 26 of the KSA Basic Law of Governance which links the loopholes of the KSA 2009 Trafficking Law and work to amend article 2 of the 2009 Trafficking Law, along the line of the legislation of the three main jurisdictions of the UK.

7.8 CONCLUSION

This chapter has analysed the exploitation element in both the KSA and the legislation of the three main jurisdictions of the UK as an essential determinant of the human trafficking offence. In this chapter, it has been established throughout that the legislation of the three main jurisdictions of the UK has a different standpoint from

¹¹⁴ I. H. Dennis, *The Law of Evidence* 3rd Edition, Sweet & Maxwell, London, 2007, 449-456.

¹¹⁵ (1988) EHRR 379.

that of the KSA. The Modern Slavery Act is one of the examples. The Modern Slavery Act has been employed by the Government to merge, clarify, and improve the existing criminal offences of modern slavery into a single Act which is simpler for law enforcement purposes and enables prosecutors to understand and implement the law successfully. The proof of specific intent is not required in the legislation of the three main jurisdictions of the UK to convict the trafficker, having been approved in the sexual and labour exploitation offences, for instance. As this approach uses the notion of potential exploitation, a high rate of conviction can be achieved. Human trafficking is said to have been committed even when there is no proof of exploitation. Consequently, if a person has been subject to any of the listed actions, the intent to exploit can be inferred.

This chapter also exposed the corresponding flaws in the domestic law of the KSA. Having to prove exploitation or intent places a much greater burden on the investigating authorities, making it very difficult to prosecute successfully, particularly in forced labour cases. According to the KSA legislation, exploitation is referred to as a special criminal intent for trafficking offences where failure to prove such intent results in the trafficker's acquittal. This question of ensuring the concurrence of all the elements and refusing to take consideration of strong probabilities has failed to ensure that THB is adequately prosecuted. This perhaps is in contrast to the legislation of the three main jurisdictions of the UK which have dealt with this situation and equally supported by the ECtHR, by not only accepting the fact that in cases of probability there is need to investigate and prosecute, but also that the ECtHR approves of reverse burden of proof. These procedural aspects have ensured that the difficulty of proving intent to exploit or prosecuting offenders is drastically reduced. It further gives better protection to victim's right. Hence, it is worthy for jurisdictions such as the KSA to review its approach and legislations so that it can deal effectively effectively the cases of THB and forced labour in the KSA.

CHAPTER 8: CONCLUSION

8.1 GENERAL CONCLUSION

This study has shown that for the last two decades, the question of human trafficking for forced labour has become a major topic, in the context of both immigration and human rights debates. Government and organizations have continued to show priority to this subject in different area of social policy and cooperation. However, despite the significance of this topic and the growing literature, information regarding the magnitude of the problem in both the Kingdom of Saudi Arabia, and in the UK, (and across the world), is limited. This has been a challenge to the both the field of research and to enforcement of anti-human trafficking measures. One of the major obstacles according to Laczko and Gramegna is that, until recently, there was no consensus either regionally or internationally on a clear definition of what constitutes THB,¹ as it is mainly viewed as a form of illegal immigration. As discovered in the course of this study, victims were often regarded and treated as individuals who breach immigration laws, technically ignoring other factors such as their vulnerability.

The most prominent internationally agreed definition came in 2000 through the UN, where many aspects involved in THB were included in the definition, such as transporting, transferring, recruiting and harbouring of persons, by means force or coercion, abduction or even through deception in order to gain any kind of benefit. This comprehensive and detailed definition shows that THB was seen as a crime that involves different strands and variables, which also may include different set of organized people or groups, from those that recruit, to others who engage in transporting or harbouring. Analysed in Chapter 4 of this study, both the UN Trafficking Protocol and the UN TOC Convention,² and also the COE Convention³ are of paradigm

¹ F Laczko and MA Gramegna, 'Developing Better Indicators of Human Trafficking' (2003) 10 Brown J World Aff 179.

² Protocol to Prevent, Suppress and Punish Trafficking in Persons (UN Trafficking Protocol), especially Women and Children, supplementing the United Nations Convention against Transnational Organised Crime adopted by General Assembly Resolution 55/25 (entered into force on 25 December 2003)

significance to the question of THB, at both the international and regional context. They not only define THB in a broader context, but they also emphasize collaboration between states.

Furthermore, this study has shown that regional bodies such as the EU have also followed the same pattern of commitment, particularly through the 'Brussels Declaration',⁴ where not only member states of the EU but also other nations, including those located on other continents were brought together to outline a set of policy recommendations on how to combat THB. The importance of both international and regional cooperation and a united position is because THB is a cross-border crime and combating it means cooperation among different countries. Yet, it is shown in this study that the level of enforcement and prosecution of crimes of human trafficking is still low. This is due to a number of reasons, the foremost of which is that implementation of legislation is often inadequate. In addition this study has found that in terms of prosecution, which mostly needs witness statements from victims, victims are afraid to testify and also sometimes deported as illegal immigrants.

One of the most significant aspects of EU legislation is Directive 2011/36/EU⁵ which requires member states to have a unified and effective framework to deal holistically with THB in the context of an international human rights approach, following in the COE Trafficking Convention, the UN Trafficking Protocol, the 2000 EU HR Charter⁶ and ILO conventions obligations.⁷

This EU directive was also instrumental in the introduction of the current EU definition of exploitation for human trafficking to include other aspects such as begging and

www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf> accessed 11 November 2012.

³ Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings* (16 May 2005, CETS 197) <<http://www.refworld.org/docid/43fded544.html>> accessed 23 June 2015.

⁴ Brussels Declaration on Preventing and Combating Trafficking in Human Beings 2002.

⁵ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

⁶ European Commission, *European Union Human Rights Charter* (2000)

<http://ec.europa.eu/justice/fundamental-rights/charter/index_en.htm> accessed 25 June 2015.

⁷ 1930 ILO FL Convention [as of 20 November 2012, there are 175 State Parties] and ILO, (C105) Abolition of Forced Labour Convention 1957 No 105, 320 UNTS 291 [1957 ILO AFL Convention] (adopted 25 June 1957, entered into force 17 January 1959). As of 20 November 2012, there are 172 State Parties.

exploitation of criminal activities.⁸ It also went further to demand mandatory support mechanisms for victims.⁹ While this directive is seen as a major turning point, this research shows that the directive has altered law enforcement practices in several areas of criminal activity.¹⁰ Essentially, this occurs because of factors such as the requirement to give victims assistance irrespective of whether they are willing to cooperate with authorities or not. Another important aspect of the directive is that it makes the minimum sentence for human trafficking up to 5 years and 10 in aggravated circumstances, for all of the EU's 28 member states. However, this is different from the other domestic provisions in the UK. For instance, the Human Trafficking and Exploitation (Scotland) Act 2015, provides for imprisonment for life or fine, or both,¹¹ and in Northern Ireland, the punishment a sentence of at least two years, which in England and Wales, it is imprisonment for life, and on summary conviction to imprisonment for a period not exceeding 12 months and a fine.

The study also found out that Directive 2012/29/EU¹² aims mainly at setting up common rules to deal with the rights of the victim and also specific instruments to do with issues of financial compensation and protection of the victim.¹³ What these instruments achieved were that the victim has incentives to persuade them to take part in trials and also gives them and the community a sense of justice when they are compensated.¹⁴ This again is an area of legal development, which is absent in the KSA, as no specific incentives were pronounced in the Saudi law¹⁵ to encourage victims to participate in a trial. Here, it is important to note that, one of the major challenges to prosecution of THB is the reluctance of victims to take part in the trial. In addition

⁸ Art 2.3.

⁹ Arts 11, 13, 14 and 16.

¹⁰ Maria Catherine O'Neill, 'The EU Legal Framework on Trafficking in Human Beings: Where to from Here – the UK Perspective' (2011) 7(4) *Journal of Contemporary European Research* 454.

¹¹ Human Trafficking and Exploitation (Scotland) Act 2015, s 4(5).

¹² Directive 2011/36/EU (n 5).

¹³ Establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA [2012] OJ 2 315/01.

¹⁴ Sławomir R Buczman, 'An Overview of the Law Concerning Protection of Victims of Crime in the View of the Adoption of the Directive 2012/29/EU Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime in the European Union' (2013) 14(2) *ERA Forum* 248.

¹⁵ Kingdom of Saudi Arabia, Saudi Labour Law: Royal Decree No M/51 (2005) <<http://portal.mol.gov.sa/ar/Pages/OrganizeWork.aspx?m=3>> accessed 12 September 2013.

because of the criminal characteristic of THB, the onus of proof is that which requires evidence beyond reasonable doubt, most of which can only be obtained with the cooperation of a willing victim.

In reference to the contents of the EU Directive 2011/36/EU analysed in Chapter four of this thesis, the Directive has provided not only for the protection of the victim but also of their right to 'continue to benefit from protection measures when moving to another Member State'.¹⁶ It is however evident that this kind of support may vary from one EU member state to the other depending on their legal and administrative differences. Hence, it is important to mention the significance of the idea that, in recognition of the separate legal approach among EU member states, separate instruments were made to ensure that these rights are upheld. For example, the European Protection Order (EPO) provides that persons who benefit from a protection order in criminal matters issued in one EU member state can request the protection of a European Protection Order when moving from one EU member state to another. Further, Regulation (EU) No 606/2013¹⁷ provides for mutual recognition of protection measures in civil matters, allowing for a direct recognition of protection orders issued as a civil law measure in one EU member state in another EU member state. Directive 2004/80/EC law also requires that crime victims be compensated, and even allows such claims for compensation to be made by persons who fell victim abroad, in another EU member state.¹⁸ In comparison to what is applicable under the KSA legislation, these laws are more specific on where the victim stands. They are also more far-reaching than even the UN Trafficking Protocol.

Although there is an obvious legal commitment by the EU to addressing these issues, the findings of this research show that the laws have been affected by a number of elements. First, there is a restraint, particularly on the victim's entitlement, as these issues are governed by individual domestic laws.¹⁹ Secondly, in the area of prosecution and evidence, improvements have been made to previous positions. For example,

¹⁶ Directive 2011/36/EU (n 5).

¹⁷ Regulation (EU) No 606/2013 of the European Parliament and of the Council of 12 June 2013 on mutual recognition of protection measures in civil matters.

¹⁸ EU COE, Council Directive 2004/80/EC of 29 April 2004 Relating to Compensation to Crime Victims [2004] OJ L 261/15.

¹⁹ Buczma (n 14).

earlier Directive 2012/29/EU²⁰ states that translation services for trafficking victims during trials/hearings should only be provided when the final sentence is passed unless the lack of translation hampers the trial in any way. This aspect of the law touches on the fundamental principle of fair hearing as the victim, who is also the witness is denied the opportunity to be appropriately involved in the proceedings. Although efforts are been made to address this issue, especially through the separate legislation, 2012/29/EU, provides that the right to interpretation and translation should be provided where necessary for the purpose of safeguarding the fairness of the proceedings.²¹ Addressing this, a new Directive was adopted in 2013, namely, DIR/2013/48/EU, which aims to ensure that minimum standards on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest are applied throughout the EU.²²

The Modern Slavery Act of 2015, the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (NI) 2015 and the Human Trafficking and Exploitation (Scotland) Act 2015 are UK's most comprehensive legislations on THB and support to victims. Not only did these acts create a better and broader framework on the definition than before, but also included the questions and challenges of victims and how they are to be supported. For example, this framework focuses beyond victims brought from overseas but also addresses the issue of those exploited at home. The Modern Slavery Act for example looks at both human trafficking and other trajectories of modern slavery such as exploitation and coercion to work illegally in brothels, cannabis farms etc. To clarify on the background to UK legislation, this research was able to explain regional, national and sub-national legislation, which includes the EU Directive and the COE Trafficking Convention.²³

²⁰ EU [2012] OJ L 315/57.

²¹ European Commission, 'Right of the Accused to Interpretation and Translation' (Justice, 11 June 2015) <http://ec.europa.eu/justice/criminal/criminal-rights/right-translation/index_en.htm> accessed 14 December 2015.

²² European Commission, 'Rights of Suspects and Accused' (2013) <http://ec.europa.eu/justice/criminal/criminal-rights/index_en.htm> accessed 29 December 2015.

²³ COE, 'Status of Signature and Ratification of the Council of Europe Convention on Action against Trafficking in Human Beings' <http://www.CoE.int/t/dghl/monitoring/trafficking/Docs/Profiles/UKProfile_en.asp> accessed 16 November 2013.

Chapter 4,²⁴ also explain how the provisions of the UN Trafficking Protocol and the COE Trafficking Convention, alongside the UK's legal obligations under its membership of the EU and the UN are playing a role in how the UK approaches the questions of THB. It was also shown that by virtue of the principle of supremacy, EU laws directly affect the laws in the UK. This is an area found to be of great dissimilarity to the legislation in the KSA. It is evident that there were a series of regional commitments made among Arab Gulf states to combat cross-border trafficking such as the Charter on Human Rights under Arab League membership,²⁵ the Covenant on the Rights of the Child in Islam under the OIC framework,²⁶ and the GCC Model Law. However, none of these laws are binding upon the KSA. Similarly, unlike the COE and the EU Directives, there is no evidence to suggest that the regional commitment agreed between the Gulf States has impacted either politically or in practice on the issues of THB. But then, both the KSA and the UK have a point of convergence when it comes to international laws, particularly conventions of the UN on human trafficking.

Another area that raises questions is the extent to which these regional laws, especially the COE affects UK domestic laws on THB. It is however important to point out that the COE provisions are responsible for the development of the National Referral Mechanism (NRM) process through which people facing the danger of trafficking are identified and supported across the UK and other COE countries.

Unlike the Kingdom of Saudi Arabia, of particular note with regard to the UK laws on human trafficking for forced labour is the difference in legislation across the four main UK jurisdictions. While England and Wales are a merged jurisdiction, having the same domestic legislation, Scotland and Northern Ireland are, for historic reasons, separate legal jurisdictions, having their own THB legislation. From the surface, all the laws share similar characteristics, mainly referring to persons recruited, harboured or transferring for the purpose of trafficking, exploitation or force labour.

²⁴ See further Chapter 4 section 4.4.3.

²⁵ League of Arab States website <<http://www.lasportal.org/>> accessed 2 October 2013.

²⁶ Organisation of Islamic Cooperation (OIC) <<http://www.oic-oci.org/oicv2/states/>> accessed 2 October 2013.

Thus, this research shows that there are differences in enforcement and particularly in the gravity of penalties between all the three legislations in the UK. Other aspects include for instance policy frameworks; Wales has an anti-trafficking coordinator that came in 2011. This study also found that all the acts across the UK have separate provisions for human trafficking and for forced labour. The Scottish legislation²⁷ for example provides in section 1 that human trafficking occurs if a person recruits, transports, harbours, receives, exchanges or transfers control over other person with a view to other person being exploited, or arranges or facilitates any of these actions, but section 4 refers explicitly to slavery, servitude, and forced labour. This section ie, section 4, specifically gives a definition of slavery and forced labour stating:

A person commits an offence of slavery, servitude and forced or compulsory labour if such a person deliberately and knowingly holds another in slavery or servitude and the circumstances are such that the person knows or ought to know that the other person is so held; or where a person deliberately force another person to perform compulsory labour.

Independent of Westminster, the Scottish law also made provisions under section 9 of the Act to support and assistance victims to include accommodation, health care, legal advice, counselling, repatriation, and interpretation.²⁸ Although the approach to victim assistance differs across the different UK jurisdictions, the definitions of offence are quite similar. The contents of the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015 and the Human Trafficking and Exploitation (Scotland) Act 2015, for instance also separates the question of human trafficking from that of slavery and forced labour, as does the Modern Slavery Act 2015.

Findings of this research shows that of all the jurisdictions in the UK have made reviews to THB laws since 2015. But their approaches are different. Northern Ireland for instance has the lowest sentence for offenders. In England and Wales; and in Scotland, the legislative framework for assisting victims is more robust than NI. For instance, the Scottish law gives the right to adult victims of human trafficking to access

²⁷ Human Trafficking and Exploitation (Scotland) Act 2015.

²⁸ *ibid.*

immediate support and help.²⁹ Similarly, it was found that sentencing for these crimes are different across the jurisdictions. Under the Modern Slavery Act 2015 and the Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, for example, a person guilty of human trafficking or forced labour is liable on conviction to imprisonment for life.³⁰ However, under the Human Trafficking and Exploitation (Scotland) Act 2015, a person guilty of these offences is liable, on conviction to imprisonment for life or fine, or both.³¹ In Northern Ireland, the punishment is a custodial sentence of at least two years. In England and Wales, a convicted trafficker is liable to imprisonment for life, and on summary conviction to imprisonment for a period not exceeding 12 months and a fine.³² The Scottish law also has a life sentence for offenders.³³ A major aspect found in the Modern Slavery Act 2015 is its limitations when compared to the European Trafficking Convention. This Act neither provides for compensation to victims nor follows the character of EU Trafficking Directive, which requires the provision of legal assistance to victims. Another important aspect is that the EU Directives have provided for a minimum sentence for offenders, yet, both England and Scotland went for the life sentence as a maximum instead even when they can apply the EU Directive. The approach by England and Wales suggest in many ways that there is difference in perspective. Evidently, the Modern Slavery Act 2015 is more punitive when it comes to punishing offender; yet, it is less considerate in terms of assisting victims with compensation or legal assistance.

It is also important to note that the different sentence categories across the UK are far greater than what is prescribed under the EU law mentioned earlier. While the EU Directive states a punishment of a minimum period of five years in prison, the Human Trafficking and Exploitation (Criminal Justice Support for Victims) Act (NI) prescribes the sentence as at least two years' imprisonment for lesser cases and up to ten years'

²⁹ *ibid.*

³⁰ Modern Slavery Act, s 5(1); Human Trafficking and Exploitation (Criminal Justice and Support for Victims) Act (Northern Ireland) 2015, ss 1(6) and 2(9).

³¹ Human Trafficking and Exploitation (Scotland) Act 2015, s 4(5).

³² A sentence via indictment is only done through trial by jury and it exposes one to harsher penalty than a summary trial, which is mainly done on admission of guilt by the offender and often attracts leniency.

³³ Human Trafficking and Exploitation (Scotland) Act 2015, s 4(5).

imprisonment for aggravated cases as provided under section 4 of the Act. In contrast, the Modern Slavery Act 2015 puts the threshold for a custodial sentence at ten years. The implication of these, especially the EU directive is that the police and prosecution in Scotland may tend to prioritize resource in dealing with these cases. This has implication in the way laws will be selectively applied. Taking all of these into context, it is safe to argue that the system and legislation on human trafficking for forced labour is different between the UK and the Kingdom of Saudi Arabia. The UK has no uniformity when it comes to sentencing and policy approach; the KSA on the other hand deals with this issue uniformly. This indeed has a lot to do with the political structure of the two regimes. The effect is that, the punishment for a person that commits this crime in the UK depends on the place where the crime was prosecuted. Also, the support for victim and the level of assistance they are bound to have depends on where the support come comes from. Relating this to for example the Modern Slavery Act 2015, the Act does not identify explicitly that a victim cannot consent to his or her own exploitation. Section 1 for instance states that the victim's personal circumstances are relevant when determining their status of being subjected to forced labour. However, the scope of these personal circumstances is limited and they do not include critical vulnerabilities such as religion and ethnicity.³⁴

Focusing on the aspect of forced labour as one of the principal aspects of human trafficking, this research was able to look at developments in legislation in KSA and the UK and also on areas of enforcement and challenges. The volume of forced prostitution and working in illegal markets has become a common and widespread aspect of THB. Hence, in all of the recent legislation, lawmakers have broadened the question of THB to include these variables. Evidence across the board shows that European countries have shown more concerns about these issues than their counterparts in other continents. Through the COE Convention, and the series of research and recommendations put in place, the source, mechanisms and design of THB were interrogated and made into concrete legislative provisions that address most of these issues, putting not only the culprits but also the victims at the centre of

³⁴ Equality and Human Rights Commission, 'Modern Slavery Bill' (2014)
<<http://www.equalityhumanrights.com/sites/default/files/uploads/Modern%20slavery%20bill%20>>
accessed 6 August 2015.

measures to combat THB. There are important aspects that the legislation puts across including the way the Internet and other advance technology tools have become instruments for recruitment and trafficking of mostly women and children. The depth of how these were used is left for future research as this study is mainly focused on the forced labour aspect and the challenges of identification and enforcement.

The COE Trafficking Convention 2005³⁵ is by far more overarching than even the UN Protocol 2000, especially in terms of victim protection.³⁶ It does not only focus on trafficking it also focus on identification and assisting victims.³⁷ Another aspect of the COE Convention that is of great significance is the emphasis on instituting mutual coordination among the various state agencies responsible for dealing with human trafficking.³⁸ Essentially, every research has shown that without cross-border coordination, THB is a crime that becomes hard to combat. The idea of the GCC commitment in which KSA played a key role was equally to have this kind of cross-border cooperation. Although it is regional legislation, the COE has proven to be comprehensive, covering even extended variables such as the challenges in prosecuting people accused of trafficking, which need identification and willingness of victims to testify. In addressing this for instance, the Convention in recommendation 97 states that such witnesses be placed under witness protection and be given psychological assistance.³⁹

This research has revealed the common traits in both KSA and the UK in relation to human trafficking for forced labour.⁴⁰ First, the KSA and the UK have a similar geographical characteristic and regional economic viability, which are two important factors that traffickers take into consideration. For example, the UK economy is one of the largest in Europe while the economy of the KSA is among the largest in the Middle East. Furthermore, the regional transit route of the GCC countries to bring people to

³⁵ Council of Europe, *Council of Europe Convention on Action Against Trafficking in Human Beings* (16 May 2005, CETS 197) <<http://www.refworld.org/docid/43fded544.html>> accessed 23 June 2015.

³⁶ Jessica Elliott, *The Role of Consent in Human Trafficking* (Routledge 2014).

³⁷ Art 10.

³⁸ Art 5(1).

³⁹ COE, Committee of Ministers 'Recommendation Rec(1997)13 of the Committee of Ministers to Member States Concerning Intimidation of Witnesses and the Rights of the Defence' (10 September 1997).

⁴⁰ Paola Monzini, *Sex Traffic: Prostitution, Crime and Exploitation* (Zed Books 2005) 35-36.

KSA, and the EU borders to travel across member states and get to the UK. This study has shown that the KSA, like the UK, is a major destination for trafficked persons from other parts of the region, especially the Middle East, Central and Southeast Asia.⁴¹ It also hires an enormous amount of foreign workers to the KSA.⁴² Despite the notion of improved laws against THB, there are still major factors such as non-payment of wages and withholding of documents, as indicators of forced labour. Other issues consist of debt bondage, and the rule that immigrants had to obtain an exit visa before leaving the KSA have all added to the danger of exposing workers to forced labour. The KSA has been placed in the category of states where 'the governments do not fully comply with the TVPA's minimum standards, but are making significant efforts to bring themselves into compliance with those standards'.⁴³

In principle, KSA like the UK has put a number of instruments in place to combat THB, including its approval of the UN TOC Convention in 2005,⁴⁴ and the UN Trafficking Protocol in 2007.⁴⁵ The KSA also followed with its own domestic legislation in 2009 through the promulgation of the Saudi Trafficking Law.⁴⁶ This was done after KSA Government ratified the UN TOC Convention. The definition of trafficking under the 2009 law includes many aspects contained in both the UN TOC and the COE. The law makes criminals recruiting, transferring, or receiving persons for the purpose of exploitation or abuse.' This definition is found to consider new aspects of modern trafficking, which were, previously absent in KSA laws. Most importantly, this researcher has been able to identify some uniqueness of the 2009 law with regard to one factor that has been absent from the UN Protocol. For instance, the Law does not simply take on the restricted approach of the UN Trafficking Protocol, which only

⁴¹ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2015).

⁴² Ray Jureidini, 'Trafficking and Contract Migrant Workers in the Middle East' (2010) 48(4) *International Migration* 142-163.

⁴³ US Department of State, *Trafficking in Persons Report: Saudi Arabia* (June 2015).

⁴⁴ UNODC, 'Signatories to the United Nations Convention against Transnational Crime and its Protocols' <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12&chapter=18&lang=en> accessed 16 November 2014.

⁴⁵ UN Trafficking Protocol, 'Signatories to the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime' <https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=xviii-12-a&chapter=18&lang=en> accessed 16 November 2014.

⁴⁶ In conjunction with the Law of Criminal Procedure Royal Decree No M/39 (16 Oct 2001), according to BLG, art 49.

comprises the nature of the criminal activity and organized criminal group; it also makes an attempt at covering all sorts of trafficking, with special emphasis on these aggravating factors. The law also categorizes those that are most vulnerable with special penalties when the crime is committed against children, women, or people with special needs.⁴⁷

It is however important to note that, despite the familiar notion that THB is a new debate, this research was able to explain the position of forced labour under Islamic law, through which most laws in KSA derive their origin. Islamic law clearly prohibits forced labour and exploitation as a form of *Ta'azir*. There are plethora of provisions in the Quran and Sunnah that proscribe exploitation, deceit, abuse and cruelty. These religious prohibitions are significant in the context of this thesis as they are the prime factors that pave the way for fighting human trafficking. Moreover, Islamic law does not permit employers to expose their workers to harsh conditions, unless they are appropriately rewarded,⁴⁸ which in this context not only disallows forced labour, it also disallows cruelty. In general, human trafficking is illegal and contradicts Islamic values.⁴⁹ Given that Qur'an and the Sunnah do not provide a very clear specification of the area in which human trafficking needs to be placed, it is considered as a crime that threatens individual security and the dignity of human person. The punishment for such crime under Islam is dependent on the nature of the violation.⁵⁰ An example of this approach as shown in this research is the position of KSA in its statement to the Committee on the Rights of the Child under articles 34–36 of the Convention on the Rights of the Child,⁵¹ that Islam prohibits unfair and forced actions, prostitution and

⁴⁷ 2009 Saudi Trafficking Law, art 4(2).

⁴⁸ United Nations Children's Fund and Al-Azhar University, International Islamic Center for Population Studies and Research, [2005] *Children in Islam: Their Care, Development and Protection—Summary* 8 <www.unicef.org/egypt/media_2369.html> accessed 22 July 2013.

⁴⁹ International Islamic University Malaysia 'Fiqh-us-Sunnah' <http://www.iiu.edu.my/deed/lawbase/fiqh_us_sunnah/vol2/fsn_vol2b.html> accessed 22 July 2013.

⁵⁰ AZ Bakr, *Hudud, Ta'zir for Ibn Qayyim: A Balancing Study* (2nd edn, Higher Judicial Institute in Riyadh 1995).

⁵¹ 'According to the Convention on the Rights of the Child: States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

any kind of exploitation. The Cairo Declaration on Human Rights in Islam of 1990 (CDHRI), for example makes it illegal to for persons to be forced to carry out task that he or she is unable to accomplish. One important aspect worthy of note is that prostitution is an act prohibited in Islam and it is considered a crime in the KSA, as it is in the UK. The implication of this is that, it has tremendously reduced the possibility of trafficking women into forced prostitution as has been happening in some EU countries where prostitution is legal, for example, Germany. No doubt, prostitution has been a major aspect that promotes THB and no matter the extent of check, criminals will still use the legality of prostitution across some European countries to traffic people for forced sexual exploitation. The 2004 Arab Charter on Human Rights came into effect in 2008, Articles 9 and 10 of which expressly deal with trafficking and slavery issues. It forbids holding people as slaves for personal benefits or trafficking for the sake of sexual advantages and prostitution and forced labour.

This study also shows that the new approach to THB by the KSA involves the introduction and consolidation of other material elements of modern human trafficking for forced labour that were not explicit in previous legislation. Moreover, there is a renewed outlook on the question of victims. For example, findings suggest that earlier legislation by the KSA, such as 1974 Border Security Law,⁵² mainly address THB from the context of border controls and illegal entry. However, later legislation that followed such as the Basic Law of Governance (BLG) 1991, have made attempts to target trafficking for the purpose of slavery and force labour.⁵³ Yet, a closer look at both laws shows that they did not cover some of the aspects that define THB. Their content according to the findings of this research are both abstract and narrow. For example, the principal article, ie, article 28 of the BLG states: ‘the state shall enact law to protect employees, but then little effort was made to identify or even protect victims.’ Instead, there are deportation facilities for runaway victims, and workers are

(c) The exploitative use of children in pornographic performances and materials. States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form (art 35). States Parties shall protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare (art 36).’

⁵² Saudi Border Security Law, (*Bureau of Experts*)

<<http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=226&VersionID=30>> accessed 12 June 2014.

⁵³ BLG <<http://www.boe.gov.sa/ViewSystemDetails.aspx?lang=en&SystemID=4&VersionID=240>> accessed 9 June 2014.

sometimes paid repatriation expenses. Even after the promulgation of the 2005 Saudi Labour Law,⁵⁴ the focus remained on cases pertaining to the workers' contracts, which falls short of addressing the exploitation and violations against individuals trafficked for forced labour. Ironically, the 2005 laws did not even address the endemic phenomenon in the KSA, which is to do with people trafficked to work in the construction sector, most of whom would today qualify as victims of human trafficking for forced labour under the *Kafala*, or sponsorship system.⁵⁵

This research also suggests that the way the 2005 Saudi Labour Law (SLL) was framed further contributes to the exploitation of trafficked people. For example, it was shown that article 51 of the SLL requires both the employee and employer to have a copy of the work permit that binds them in a legal contract. Paradoxically, most domestic workers are uneducated people from poor countries and are not aware of these laws and their rights, and live in unpredictable legal limbo under fear, threat of deportation and therefore vulnerable to all sorts of abuses and forced labour. Further, this research found that despite other protective measures contained in the law ie, the agreement on remuneration under article 59, and the prohibition of working outside what was originally agreed under article 60, there is little evidence to suggest that victims are identified and assisted and there is also little evidence to show the prosecution of people found for human trafficking and forced labour. Another important part of the SLL is article 65 of the SLL. This provision permits employers to withhold employee's allowances for up to a year. This is both exploitative and against the standards of labour laws and also allows for forced labour.⁵⁶

As discussed in Chapter 6, the most comprehensive legislation against human trafficking in KSA was the 2009 Suppression of the Trafficking in Persons Act, which came into force in 2013. This law not only follows the concept of other laws such as the UN Convention, it also sets out clear penalties for offenders. Depending on the gravity of the offence, this could lead to either a fine or imprisonment, with an increased penalty in specific situations, such as trafficking committed by an organized

⁵⁴ Saudi Labour Law: Royal Decree No M/51 (n 15).

⁵⁵ See further section 5.4.2 below.

⁵⁶ Joseph Kéchichian, *Legal and Political Reforms in Saudi Arabia* (Routledge 2012).

criminal group, and crimes committed against women, children, or persons with disabilities.⁵⁷ The major significance of this law is that it identifies the most vulnerable groups, and also prescribes penalties for both normal and aggravated circumstances in human trafficking for forced labour.

No doubt the law has improved, especially with the additional enactment of the promulgation of the National Committee to Combat Crimes of Trafficking in Persons (NCCTP) of July 2009, which contains provisions meant to identify and care for victims of THB. This is the first time that laws meant to work to identify and assist victims mandate the police and other institutions of the state. Another important aspect of this legislation is the right of the victim to stay within the KSA with a work permit. Alongside this law is the National Family Security Programme established with the sole role of identifying and assisting children that are victims of THB.

This study also found that one of the major factors that still hinders the judicial organizations in both the UK and the KSA is the fact that greater emphasis is still on sexual exploitation and forced prostitution as the primary type of human trafficking. This means that there is remains a lack of proper understanding of the various kinds of human trafficking like forced labour. In addition neither of these countries have significant instances of arrests for forced labour, despite the fact that such crimes are on the rise. Hence, greater guidance and a change in approach is needed, especially among law enforcement agencies. Evidently, both countries have made efforts but data suggests the offenders are escaping prosecution because the agencies are more focused on deporting and detaining the victims. As a result, the victims lose their right to protection and are returned to their homeland where they face an increased risk of re-victimization, leaving the organized crime gangs to continue in business. This is occurring because of the approach of the authorities to prioritize deportation of the victims over the prosecution the traffickers, in order to protect the sovereignty of the region.⁵⁸

⁵⁷ See further Chapters 5 and 6.

⁵⁸ NCCTP, 'NCCTP Strategic Plan' (NCCTP 2013) <<http://nshr.org.sa/>> accessed 2 November 2014.

8.2 RECOMMENDATIONS

While both the UK and the KSA criminalize THB, this study has shown that in order to combat human trafficking, it is important to have regard to all of the crime's aspects that contribute to its expansion and development. The mechanisms for the identification and prosecution of offenders in the UK are robust compared to what is found in the KSA. Hence, this area needs to be reviewed by the KSA by formulating strategies that focus on identifying victims, giving them incentives and support along the lines being taken in the UK and ensuring the prosecution of offenders.

The KSA must also give emphasis to THB as a crime against humanity and not prioritize it as a question that affects state sovereignty. Moreover, other laws too are specific and only aim at combating human trafficking as a crime. On this, the KSA needs to revisit laws such as the 1974 Saudi Arabian Border Security Law, which prohibits human trafficking, but fails to include provisions pertaining to the prosecution of traffickers.⁵⁹

Another important matter is the distinction that needs to be made between trafficked victims and irregular immigrants. This should be set out in the Border Security Law in order to avoid confusion. While analysing the historical development of anti - trafficking legislation in the UK, the Asylum and Immigration (Treatment of Claimants, etc.) (AICA) 2004, which has been replaced has some profound effect, especially in articles 1–6, which are good models that may be considered by the KSA, especially the areas that consider trafficking as anything that facilitates or arrange the movement of a person into, out of, or within the country with the intention of exploitation. Most importantly is for the KSA to consider incorporating the approach of the UK which includes any presumed intention as a reason to investigate and if necessary prosecute offenders. Making these amendments would likely increase the efficiency with which traffickers are identified, the crime adequately investigated and prosecuted. It will also ensure proper and most deserving safeguard to victims.

⁵⁹ Saudi Border Security Law (n 15).

of exploitation. It is important for the KSA to incorporate these provisions within the 1974 Saudi Arabian Border Security Law. This would likely increase the efficiency with which traffickers are identified and prosecuted, as per the 2009 KSA Trafficking Law.

Furthermore, the 2005 Saudi Labour Law⁶⁰ also does not include an update regarding the issue of trafficking for forced labour. As a result, it fails to be dealt with properly by KSA law. This comparison of the legislation of the UK and the KSA clearly shows that the UK has been more efficient at combating, criminalizing and prosecuting human trafficking offences and offenders for labour and sexual exploitation.⁶¹

Moreover, guidance only is not sufficient. It is therefore essential for the states to collaborate on this issue, specifically those countries where victims originate and those countries where they mostly taken to. For example, cooperation between Yemen, Indonesia and Saudi Arabia. Also, it would be beneficial to provide expert training for both proprietors of businesses and workers, to assist them in recognizing what human trafficking of workers includes and how to deal with it. Many employees who suffer mistreatment are not even aware of the fact that they are the prey of traffickers for forced labour.

This researcher suggests that training on anti-trafficking measures should be mandatory to ensure that the law enforcement agencies, judiciary, prosecutors, first responders, and related officials all have a clear understanding of the aspects of human trafficking offences. Convictions should also be given high priority.

In addition, cooperation between the competent authorities achieves the best results when combating human trafficking rather than a separated approach. Thus, the competent authorities in the KSA could benefit from UK experiences by similarly uniting KSA law enforcement efforts to assure greater prevention of the crime of trafficking.

In the UK, the Government supervises all enforcement agencies, but there are also a number of NGOs that support services for THB victims. This also can be encouraged by

⁶⁰ Saudi Labour Law: Royal Decree No M/51 (n 15).

⁶¹ Saudi Labour Law: Royal Decree No M/51 (n 15).

Saudi Arabia so that the society would appreciate that THB is a problem to the whole society and it is everybody's business to help and assist.

Protecting the victims of human trafficking is essential and this research believes that both international human right laws and Islamic human rights have to consolidate on a consensus that would put the rights and dignity of people subjected to all kinds of violations at the centre of all policy decisions. Hence, whether in the context of UK laws or those of the KSA, the aspects of THB must be treated as crimes against humanity. Ironically, the findings of this research suggests that there is still much to be done in terms of protection and assistance to victims of THB both in the UK and in the KSA. It is however understandable that the question of human trafficking and forced labour is still a subject under review and is still on-going across both countries. For example, it is shown in this study that there is no adequate civil society involvement in the KSA to assist victims. There is only one renowned organization which is the NCCTP.⁶² This inadequacy of protection is apparent in the UK as well, where there are only few organizations, with limited remits, to assist a large number of victims (e.g. the Poppy Project, the TARA Project, and the MHWA). It is important to note that there are a number of issues surrounding the workings and even the geographical spread of NGO's in the UK and in the KSA, but that is not what this study intends to interrogate. Although there are other ways to protect victims in the UK, these are limited to particular types of trafficked victims who are evaluated according to specific criteria, which essentially marginalizes other victims. Even though the NCCTP in the KSA ensures,⁶³ that the victims of trafficking are assisted and protected by being provided with a home and psychological and social help, with many branches in various cities overseen by the Government, they are only concerned with providing assistance to women and children (as happens in the UK) who have been sexually exploited and turned into in-house servants. The protection is only provided to women and children (not to men) and under certain conditions, based on historical issues. Hence the researcher believes that protecting the victims of human trafficking in the KSA is not

⁶² The NCCTP came into being in 2009 (1430 AH) and ensures that the victims of trafficking are duly recognized, are kept in appropriate conditions, and are not abused. It also manages communication links with other concerned agencies and helps in the repatriation of victims.

⁶³ The Saudi Human Rights Commission's Standing Committee to Combat Crimes of Trafficking in Person, *Report of Human Trafficking in Saudi Arabia* (2012); NCCTP (n 58).

enough, because this restrict provision of assistance to only some victims. Conversely, the UK should create more organizations to deal with an increasing number of victims since there are currently very few.

In addition, it should develop and increase the capacity of current providers to ensure that the law protects all types of victims of human trafficking. Moreover, the UK must re-evaluate what is required to assist the organizations that provide assistance. The trafficked victim is vulnerable and should be assisted rather than neglected. Both countries should re-evaluate places to be allotted to male victims of forced labour. These male victims are continuously increasing, more so than their female counterparts.

It is evident from Chapter 3⁶⁴ that there is a difference between smuggling and trafficking, and this difference ultimately requires a change in the methods used to deal with smugglers and traffickers. However, the victims of trafficking receive the same treatment as smuggled ones since both may be deported, unless they are prepared to assist the authorities in the UK. It is therefore important to look at every case differently and interrogate the facts and circumstances so that proper assistance can be given especially to victims.

Moreover, providing temporary accommodation is a protection strategy that is accorded by the NCCTP in Saudi similar to what is also provided in the UK, albeit it is not sufficient because it reaches very few trafficked victim. What is however important here to state is that the NCCTP is more concerned with those trafficked for forced labour. They also put greater emphasis on assisting victims to be repatriated. The victims are mostly not given a chance to stay in the KSA, even if they have assisted law enforcement agencies with investigations and in giving evidence in court depending on the Public Prosecutions' evaluation. This study believes there is room for improvement by the KSA to follow the UK's approach, where victim's assistance of law enforcement may guarantee the grant of a permanent residence permit granted under the Nationality Immigration and Asylum Act 2002. Thus, the researcher believes that authorities in both the UK and the KSA should re-evaluate the issue of granting victims

⁶⁴ See further Chapter 3 section 3.3.

legal rights to stay. It is evident that the UK does that in some circumstances, unlike the KSA, which has adopted as its main approach deportation. This is because, when deported, victims often become vulnerable to being re-trafficked or further victimization by their traffickers. It also makes the victims reluctant to assist authorities because they have little to gain and much to lose if their only fate is to be removed from the country. Giving them protection and protecting them is an option that will help in not only prosecution of traffickers but also protecting the most vulnerable from further abuse.

As the identification of the victims of trafficking is necessary and depends upon protection and assistance being provided, the creation of the NRM, based on the COE Convention, is deemed to be a sign of improvement in the UK. Thus, the KSA Government must develop a similar mechanism, and utilize an NGO that does not depend on the public prosecution body to confirm the victims of trafficking. This is because it rests on ascertaining the circumstances and psychological factors of trafficked victims (who should be considered victims), which is not easy for prosecutors and police.⁶⁵

Ultimately, trafficked individuals should not be criminally liable for offences committed because of being trafficked, such as creating false passports, if this was done under duress. The organized crime gang abusing the victim should be held responsible for this crime. The researcher believes that there should be a shift to the approach of considering the trafficked victim as lacking responsibility. This affords greater protection to the victim if it is proved that he is the victim, irrespective whether he or she has breached immigration laws or committed a crime, by relying on the defence of coercion, such as in cases of forced prostitution and forced labour.

⁶⁵ The Ministry of Social Affairs in the KSA makes assistance and protection available to victims of domestic violence and trafficking in persons through the provision of shelters and psychological and social support. A number of national associations and institutions also provide care for children being exploited for purposes of begging, and the Ministry of Social Affairs supervises centres for the shelter and social and medical care of domestic workers. However, the social care of these categories is not confined solely to the provision of shelter; it also extends to the provision of various types of financial aid, rehabilitation, training and vocational assistance for those in need of employment.

8.3 FUTURE RESEARCH

There are certain further discussions that are relevant to this research but outside the scope of this particular piece of research, and are therefore left for future studies. One of these is the question of organized crime in the context of human trafficking in which both the laws in the KSA and some provisions of the UK's Serious Organised Crime and Police Act 2005 (as subsequently amended) have areas of convergence. By extension, this also relates to the issues of organized prostitution rings, which occur in the context of sexual exploitation. Their position in scholarship on THB, the question of statutory definition, legal technicalities, investigation and implementation are all part of the bigger THB picture, but given the focus of this thesis on forced labour, must be left to future researchers. Also the THB, human smuggling and general visas, asylum and immigration from a legal and law enforcement perspective all form part of the bigger THB picture as to the political and international relations issues of unstable neighbouring states and less well developed countries and also add this to the debate and future investigations for THB as well as international relations and development studies.

Another aspect that could be looked at in the future is the status of existing laws and how they affect migrants and refugees running away from conflict. This can be looked at from the context of how refugees have now become subject of human trafficking/smuggling from places like Syria, Iraq, Yemen, Eretria etc. into Europe. This area has raised many questions and debates on who is a refugee; who is a migrant and who is an economic migrant. However, there is little attention being paid to the question of how many of them are victims of THB.

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Trafficking in Human Beings for Forced Labour: A Saudi Arabia and UK Comparative Legal Study

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This paper analyses forced labour and human trafficking laws from the UK and the Saudi Arabian perspective. It begins with a discussion of the characteristics of human trafficking and the legal frameworks adopted by transnational and trans-regional bodies to restrict human trafficking. Next, the paper analyses the legal instruments in the UK and Saudi Arabia for the protection of victims of trafficking, and finally it provides a critical commentary on forced labour and the international and national legal instruments for preventing this. This examination of both states' efforts to identify the weaknesses and strengths of each, and in particular to address the weaknesses in the Saudi system as compared to the UK system, is the main purpose of this paper. Saudi Arabia can improve its ranking from Tier 3 to Tier 2 (United States Department of State, 2002) if reforms are introduced in the legislation and enforcement domains. (Tier 1 means 'countries whose governments fully comply with the TVPA's [Trafficking Victims Protection Act 2000] minimum standards for the elimination of trafficking'; Tier 2 means 'countries whose governments do not fully comply with the TVPA's minimum standards but are making significant efforts to bring themselves into compliance with those standards'; and Tier 3 means 'countries whose governments do not fully comply with the TVPA's minimum standards and are not making significant efforts to do so'.) The anti-trafficking laws are also improving in Saudi Arabia, with an emphasis on the role of the law enforcement agencies in preventing the occurrence of trafficking across Saudi borders.

Keywords: trafficking in human beings; forced labour; European Union; UK; Saudi Arabia.

1. Introduction

Human trafficking is an international issue and is considered to be an illegal act that is the modern-day equivalent of slavery (Bowden, 2011). The act involves hiring people by force, and transporting them for the purpose of exploitation (Winterdyk and Reichel, 2010). Article 3 of the United Nations Trafficking Protocol provides a comprehensive definition of human trafficking: 'Trafficking in persons shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of

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vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs'. The definition states that the use of threats, deception and coercion (Malone, 2001) as means to recruit, transfer, transport or extract labour from children, men and women should be termed human trafficking. The scale and magnitude of human trafficking is evident from a report by the United Nations Office on Drugs and Crime in which the agency indicated that there are more than 127 countries of origin and 137 destination countries, and that 98 countries are used as transit countries (United Nations Office on Drugs and Crime, 2006). According to US government estimates, the number of people throughout the world who are trafficked each year is between 700,000 and 4 million (United States Department of State, 2002). A higher number of people are trafficked from the developing to the developed countries with the promise of jobs and a better life (Vermeulen, 2001). The seriousness of this issue has led the transnational and trans-regional bodies to generate legislations against this crime.

Since the crime is widespread and poses serious threat to the life and security of the victims, laws in the UK and Saudi Arabia serve to protect the rights of these victims. Moreover, an important feature to note here is that the main motivation for human trafficking is the exploitation of human beings in sexual or forced labour, which is another serious consequence of human trafficking.

2. Discussion

Globally, there has been a lack of progress on agreeing a common definition of what constitutes human trafficking. It is also worth noting that victim consent has long been used as a defence by the perpetrators of trafficking, who state that their victims gave their consent to being trafficked (Raymond, 2002). However, the perception of this has changed over time, and now even if the victims initially agree that they consent (United Nations, 1951), this does not mean that the perpetrators should be acquitted of charges of human trafficking. Thus, victims' rights have been strengthened so that a consent granted merely by victims themselves is no longer sufficient. However, victims who fall prey to the designs of trafficking perpetrators just to improve their living standards cannot avail themselves of a remedy under the United Nations Trafficking Protocol (United Nations, 2000).

Another aspect of anti-trafficking laws is that coercion is not a necessary condition for the guilt of perpetrators; in fact, the victims can claim to have been

underpaid or exploited economically or sexually without their express consent. (One stage in the negotiation process for the definition of sexual exploitation states that “sexual exploitation” shall mean: of an adult, [forced] prostitution, sexual servitude or participation in the production of pornographic materials, for which the person does not offer himself or herself with free and informed consent’.) Traffickers use economic issues or the economic status of victims as a means to exploit them. The act of transferring and recruiting a victim is also included in the broad definition of trafficking. It is pertinent to mention that the initial transportation of a victim for the sake of economic exploitation and the removal of a child’s freedom are also acts of exploitation.

The social conditions that may give rise to incidents of human trafficking are corruption, coercion and a general abuse of the law in society (Schloenhardt, 2000). When people lack the general income levels to support their families and meet their personal expenses, it is likely that they will get trapped in a situation that leads to human trafficking.

The United Nations Convention against Transnational Organized Crime (UNTOC) 2000 also defined trafficking by stating that it is the act of the recruitment, transportation and harbouring or receipt of persons (United Nations, 2000). The UK and Saudi Arabia have adopted this definition to explain the general conditions that constitute trafficking. Each word that is used in the definition of trafficking has great significance. For instance, recruitment may refer to accepting job applications and hiring people.

Trafficking in human beings is an organised crime and involves the operational and financial sides of this illicit trade in humans. The financial aspect is particularly complicated as the victims are usually underpaid while performing forced labour and the operations are handled by several loosely connected entities and persons residing in different countries (International Labour Organisation, 2014). Human smuggling and human trafficking should be treated differently. The former involves the wilful transportation of human beings, whereas the latter may involve coercion through economic or sexual abuse. The aspect of globalisation (Sassen, 1998) has made the issue of human trafficking much more important. Recent statistics (United Nations, 2000) by the United Nations and other international bodies indicate that, despite the phenomenon of human trafficking being widespread, governments take minimal steps to improve data collection and reporting of instances of trafficking in human beings.

3. The International Legal Protocols Associated with the Protection of Trafficked Victims

It is agreed in the academic research and policy circles of the UK and Saudi Arabia that the issue of human trafficking has not been adequately addressed (United Nations, 2000). The European Union (EU) laws regarding human trafficking and victim protection are developed on notions of respect for human dignity, on guarantees of human rights and on the basis of a democratic culture to foster transparency (Council of Europe, 1950). Any laws that violated standards of human dignity and respect were annulled after the formation of the EU. The Lisbon Treaty (Article 1) is of primary importance in this regard (European Union, 2007). The EU laws also identify people who are at risk of being trafficked or exploited by organised networks of traffickers. The EU framework regarding human trafficking requires the member states to address the issuing of legal proceedings, the prevention of criminal acts (European Union, 2010) and the facilitation of the rehabilitation of victims of trafficking activities.

It is pertinent to mention that the role of the law enforcement agencies in protecting victims is reactive rather than proactive (Council of Europe/European Court of Human Rights, 1980). To help victims access the judicial system to obtain a remedy, the system must be responsive, and enforcement agencies must be sensitive to the needs and constraints of victims of trafficking. Research into the subject of victims' assessments indicates that there are two main reasons for the poor reporting mechanisms and results with respect to safeguarding victims of trafficking. The first is the failure of law enforcement agencies to locate trafficking victims, and the second is the reluctance of victims to report incidents directly to the police. Fear of losing identity documents and the withholding of important documents which victims can use to register their complaints are other reasons why trafficking incidents are not reported (International Labour Organisation, 2005).

The case law is an important source for understanding the processes of the judicial system and the loopholes in the legislative framework for redress for victims. The case of *Siliadin v. France* (Council of Europe/European Court of Human Rights, 2006) is a good example. A minor girl was brought to France from Togo, and she was promised that her status would be legalised after she had resided in France for a few weeks. In fact, the minor was forced to work for long hours without adequate payments (Cullen, 2006). The offenders, Mr. and Mrs. B, were not accused of trafficking the minor to France, but were only charged under the forced labour provisions of EU law (Cullen, 2006). It is pertinent to mention that the victim also brought a claim of the non-fulfilment of the state's duty because there had been a breach of Articles 1 and 4 of the European Convention on Human

Rights. This convention requires, based on its effective actions provisions, that offenders are properly punished. The state was found to be complacent about taking action to correct its laws pertaining to anti-trafficking and forced labour. The European Court of Human Rights also found that, more often than not, offenders cannot be convicted because states have failed to include the anti-slavery provisions in their legislation. The court has also emphasised that the laws pertaining to slavery, servitude and forced labour should be segregated. The court has observed that failure to do so might result in the acquittal of prime suspects in cases of forced labour and trafficking, due to the eventual confusion, which mean the Articles 225-13 and 225-14 of the French Criminal Code did not satisfy the requirements of Article 4 of the European Convention on Human Rights.

The role of the Strasbourg Court is vital in emphasising that member states should develop laws based on Article 4 of the European Convention (Council of Europe/European Court of Human Rights, 2010). The Council of Europe has also observed that there has been a failure of successive governments in European countries to pursue the legislation issues related to slavery and other forced labour issues proactively (Council of Europe/Parliamentary Assembly, 2004). The Council of Europe has also emphasised that both Articles 3 and 8 of the European Convention apply to trafficking. These articles ensure that the moral and physical integrity of victims is protected where cases of human trafficking and slavery are involved (Egan, 2008). The present authors' opinion is that states must develop their national laws in harmony with the international protocols, and use both as legislative frameworks to take action against human trafficking and forced labour offenders. The steps taken by the UK in making its trafficking and forced labour laws effective are also worth investigation. The UK government has not been proactive in closing the loopholes in legislation related to trafficking and forced labour. The European Convention on the Protection of Human Rights and Human Trafficking is another important framework that the Saudi Arabian and other governments can follow in reforming their legislation according to international standards.

4. Forced Labour and the Legislative Framework Relating to Forced Labour

There are considerable disparities between the legislative frameworks adopted at the regional, national and supranational levels. The aspect of forced labour has gained much importance in recent years. The Saudi laws are in an embryonic phase, and can only be described as preliminary when it comes to addressing issues related to forced labour. The International Labour Organisation's Convention 29, promulgated in 1930, contains a definition of forced labour. According to this

definition, work or service extracted under menace of any penalty or harassment is termed forced labour (International Labour Organisation, 1930). The International Labour Organisation has defined eight types of forced labour (International Labour Organisation, 2005) that can lead to trafficking in persons. The categories are slavery, abduction, compulsory participation in work without pay, domestic work, farm and rural debt bondage, bonded labour, trafficking-related forced labour and military labour.

The International Labour Organisation has published two important reports on the state of forced labour. The first report was entitled *A Global Alliance against Forced Labour* and was published in 2005. The report estimated that, at that time, the number of people forced into labour was 12.3 million, but said that the estimated figure might be considerably lower than the actual figure. The report also mentioned that more than 80% of forced labour is extracted by private agents for economic gain (Davidson, 2006). It is pertinent to mention that the International Labour Organisation's 2012 estimation of the number of people forced into labour is a great increase on the 2005 figure. The 2012 report indicates that 20.9 million people are performing forced labour (International Labour Organisation, 2012). Yet, the statistics might not be representative of the state of forced labour in some underdeveloped countries, as the reporting mechanism for forced labour is quite weak in the majority of Third World countries. The right not to perform forced labour is regarded as a fundamental human right, and the International Labour Organisation has also published the Declaration on Fundamental Principles and Rights at Work Framework (1998).

The European Court of Human Rights has observed that, in the European context, Article 4 of the European Convention on Human Rights (entitled 'Prohibition of Slavery and Forced Labour') (Council of Europe, 1950) is the prime instrument for curtailing forced labour. The court has also observed that the protection of victims of forced labour is an essential characteristic of a democratic system (Council of Europe/European Court of Human Rights, 2012). The European Convention on anti-trafficking highlights the fact that poor living and work conditions, along with violence and abuse, are relevant elements of cases of human trafficking and forced labour.

From an international perspective, the Convention on the Rights of the Child (Office of the United Nations High Commissioner for Human Rights, 1989) is the most important legislative framework that Saudi Arabia should adopt and incorporate within its national legislative framework to combat forced labour. Anti-trafficking remains one of the most prominent items on the agenda of the United Nations Children's Fund (UNICEF). The author has found that the Saudi laws on forced labour and anti-trafficking are considerably limited in their scope

and enforcement provisions. The United States Department of State's *Trafficking in Persons Report*, published in 2014, indicates that Saudi Arabia is a Tier 3 country, meaning that it is a destination country for men and women subjected to forced labour (United States Department of State, 2014). The Saudi national laws pertaining to forced labour and anti-trafficking fail to incorporate negative and positive obligations on these issues. Part III of the Saudi Labour Law (Saudi Ministry of Labour, 2005) is entitled 'Employment of Non-Saudis' and the laws in this part identify the protocols that an employer needs to follow in order to hire people from abroad.

Article 37 states that agreements for the hiring of foreign labour by local employers shall be in writing (Saudi Ministry of Labour, 2005). The domestic workers category is the largest one in which people are forced to provide labour. The category is not dealt with specifically in Saudi law, and this leaves ample room for offenders to exploit economically distressed foreign workers. Article 61 of the Labour Law states that the employer shall not use force to obtain labour from his workers, shall not obtain any unpaid labour and shall not withhold a worker's wages or any part of his wages (Saudi Ministry of Labour, 2005). The dignity and religion of workers is also to be preserved when paid labour is performed. A person who employs foreign labourers in Saudi Arabia can withhold his workers' passports and this is in stark contradiction to labour laws (Buczma, 2013).

5. Saudi Arabia's Efforts in the Fight against Human Trafficking

Some irresponsible practices by some institutions or individuals make Saudi Arabia vulnerable to the charge of practicing trafficking in human beings, by international organisations. Also, some practices by individuals in Saudi Arabia contributed to drawing a bad portrait of the kingdom, by international organisations, in the field of human rights. A lax handling of employment and low wages issues creates a fostering environment for trafficking in human beings: 'a salary that does not exceed 600 Saudi Riyals (about US\$165) naturally exposes employees to exploitation' (Al-Bakmi, 2013). (One form of the practice of low wages is benefiting from the labour force by illegal and unethical methods, such as when a citizen obtains ten work visas for workers in different specialisations. But when they arrive, this citizen 'releases' them, in order to bring him monthly or annual income. In this way, these workers become free in the market and able to perform one or several activities, provided that they pay an agreed fee to the sponsor, i.e. the person who invited them. This represents exploitation and practice of human trafficking; it has serious implications in the market and for security). On the other hand, overstaying pilgrims and performers of Umrah become engaged in illegal work after the end of their statutory period of stay, making them

vulnerable to exploitation due to their illegal status and seeking employment in irregular ways (Ksnawi, 2011).

It is unfair to consider that the international reports about the phenomenon of trafficking in human beings in Saudi Arabia draw a true picture of the reality of this phenomenon on the ground; it is also a mistake to believe that the state institutions ignore this problem. The facts testify that governmental and practical efforts have been made for monitoring the problem within Saudi society and that they are trying to draw an effective government policy to combat it.

Since 2003, Saudi Arabia has increased its efforts to prevent trafficking in persons, especially in the field of domestic workers, and has created several joint inter-agency committees to research and develop programmes for educating foreign workers and facilitating a return to their home countries and for the protection of children (Marei, 2009). While the author appreciates the efforts of Saudi Arabia aimed at reducing the phenomenon of human trafficking on its territory, the success of the kingdom's policy to control the problem depends, in his view, on its commitment to the following measures (Marei, 2009):

- Prompt work on the issuance of an integrated legislation criminalising all recognised patterns of trafficking in human beings, including foreign domestic workers in particular.
- Incorporating into the employment and workers' regime harsh criminal sanctions for employers who engage in patterns of forced slavery of their workers, and making domestic workers subject to the employment law provisions.
- Raising the efficiency of people employed in Saudi work and employee offices and bringing in specialised personnel qualified to deal with workers and employers' problems in accordance with applicable laws and regulations.
- Taking adequate measures to prevent the smuggling of illegal workers to the kingdom, considered as an inlet for the presence of exploitable people. Also, update the immigration law and other regulations to ensure that migrant workers are getting their legitimate and fair rights.
- Taking adequate measures to reduce the number of 'unrestricted visas' or visas not associated with actual employment.
- Launching awareness campaigns among the younger generation in schools and universities about the dangers of contemporary slavery and its negative effects on society.
- Devoting community efforts to prevent the phenomenon of children begging, especially taking adequate measures to prevent cross-border trafficking of children to Saudi Arabia.

6. Conclusion

Saudi laws are in a preliminary phase of development, and there is a lack of clear, concise and workable definitions that can be used to eliminate forced labour and people-trafficking. The ample room for discretion provided to ministers of the government allows the abuse of the inadequate laws related to forced labour and human trafficking. As there is very little jurisprudential history of cases relating to forced labour and human trafficking in Saudi Arabia, the government can adopt measures to incorporate provisions from the Convention on the Rights of the Child, the International Labour Organisation Convention 29 and the European Convention on anti-trafficking. Provisions and articles in the international legislative frameworks related to forced labour should be incorporated into the Saudi labour laws.

Saudi Arabia should also bring in laws pertaining to the state's positive and negative obligations and should develop enforcement agencies that would deal with the issue of forced labour. The country can improve its ranking from a Tier 3 to a Tier 2 country if reforms are introduced in the legislation and enforcement domains. In recent years, Saudi Arabia has issued legislation governing the treatment of immigrant workers (Saudi Ministry of Labour, 2013). This is seen as an effective method to resolve issues faced by workers in the future. The anti-trafficking laws are also improving, with an emphasis on the role of law enforcement agencies to prevent the occurrence of trafficking across Saudi borders.

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APPENDICES

Poster to the Seventh Saudi Students Conference and Abertay University 2014



وزارة التعليم العالي
MINISTRY OF HIGHER EDUCATION
المملكة العربية السعودية
KINGDOM OF SAUDI ARABIA

Trafficking in Human Beings for forced labour : A Saudi Arabian – UK/EU Comparative Legal Study



Introduction

The problem of human trafficking in the last decade has seen a significant development of responses at the national, regional and international levels. The nature of this transnational phenomenon requires global action with the involvement of several actors in origin, transit, and destination states. Many contemporary issues linked to human trafficking, such as immigration, organised crime, labour laws and human rights, makes trafficking a more complex offence. It has moved beyond action against slavery towards aiming at any kind of exploitation of the human body (including sexual or labour exploitation or the removal of organs).

In this poster, the term "human trafficking" is understood in line with the definition of trafficking under the United Nations Trafficking Protocol. It can be concluded that the crime of human trafficking comprises the three following elements:

The act: the recruitment, transportation, transfer, harbouring or receipt of persons.

The method: the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, and the abuse of power or a position of vulnerability. This also includes the giving or receiving of payments or benefits to achieve the initial consent by one person to have control over another.

The purpose: this is the exploitation of others for sexual purposes, for forced labour or services, for slavery or practices similar to slavery such as servitude or the removal of organs.

Trafficking
Action

+

Trafficking
Means

+

Trafficking
purpose

=

Trafficking
in Human
Beings

Forced labour in the world today!!

- ✓ On Jun 2014 the ILO adopted new Protocol to tackle modern forms of forced labour.
- ✓ A new legally binding ILO Protocol on Forced Labour aims to advance prevention, protection and compensation measures, as well as to intensify efforts to eliminate contemporary forms of slavery.

According to (ILO) 2014 "Forced labor, which includes commercial sexual exploitation, domestic and agricultural work, mining, as well as some other economic activities, generates \$150 billion in illegal profits annually".

What is Forced Labour?

Forced labour is any work or services which people are forced to do against their will under the threat of some form punishment. Almost all slavery practices, including trafficking in people and bonded labour, contain some element of forced labour.

Forced labour affects millions of men, women and children around the world. According to the ILO's new global estimate "nearly 21 million people are victims of forced labour across the world, trapped in jobs which they were coerced or deceived into and which they cannot leave". Most frequently found in labour intensive and/or under-regulated industries, such as:

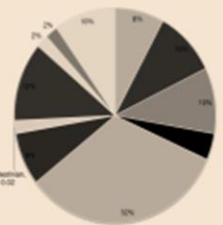
- Agriculture and fishing
- Domestic work
- Construction, mining, quarrying and brick kilns
- Manufacturing, processing and packaging
- Prostitution and sexual exploitation
- Market trading and illegal activities (begging).

Human Trafficking in the KSA

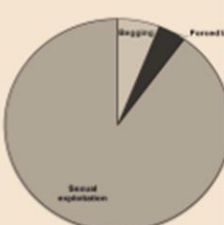
The level of KSA and UK according to the reports of the United Nations to combat human trafficking in the world.4

	2011	2012	2013
Saudi Arabia	TIER3	TIER3	TIER3
United Kingdom	TIER1	TIER1	TIER1

Nationality of trafficked victims



Types of exploitation




Conclusion:

Human trafficking in general is a phenomenon which involves a range of interrelated areas. Amongst the contemporary issues linked to trafficking are immigration, organised crime, labour laws and human rights. Trafficking is a particularly complex crime and legal initiatives to mitigate the activity have moved beyond action against slavery towards targeting any kind of exploitation of the human body.

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Types of forced labour (in millions of people)

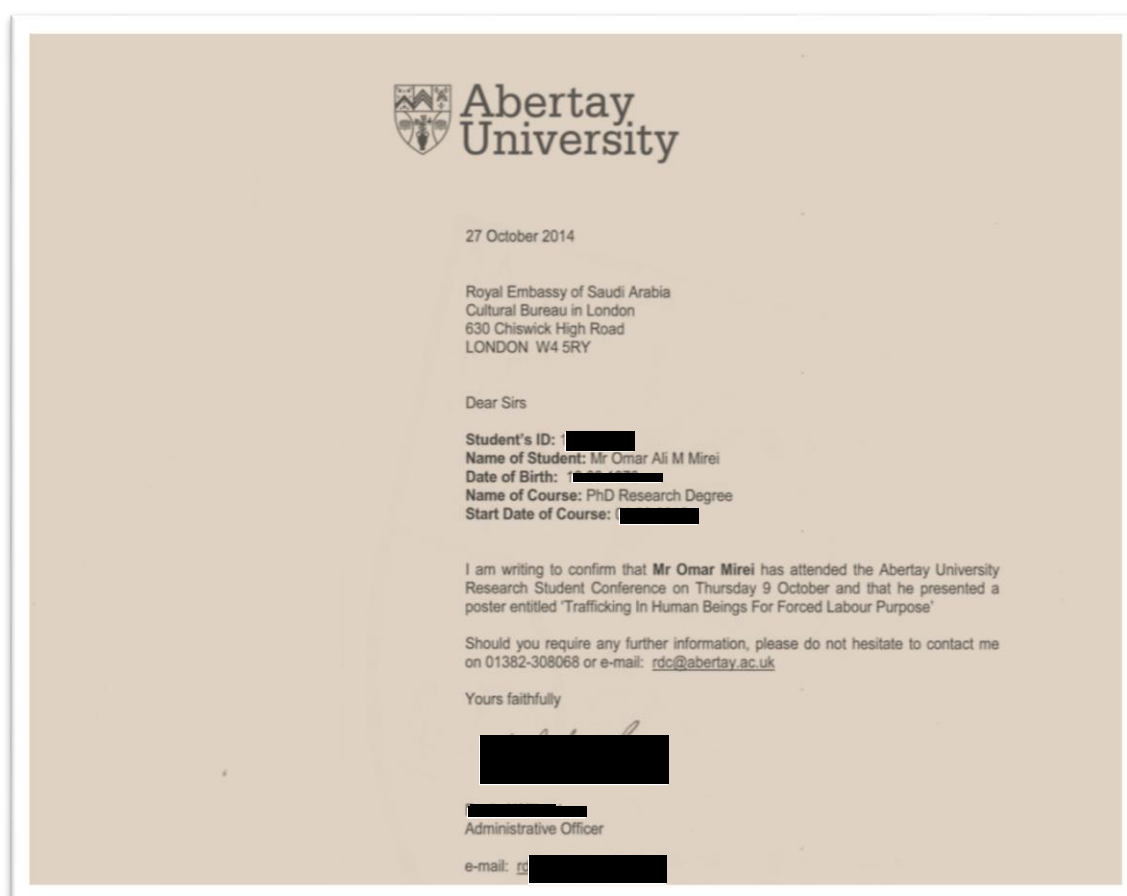
Category	Value (millions)
Forced labour exploitation (in bonds)	14.2
Forced sexual exploitation (in bonds)	4.5
State-imposed forced labour (in bonds)	2.2



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Poster at Abertay University Conference 2013 - 2014



Paper to the Eighth Saudi Students Conference 2015



**Two-day seminar on 'Countering Trafficking In Human Beings In The Private Sector'
(12-13 June 2014, ERA Conference Centre Metzger Allee 4, Trier, Germany)**



ZERTIFIKAT · CERTIFICATE · CERTIFICAT

This is to certify that

Mr Omar Mirei

attended the seminar

**COUNTERING TRAFFICKING IN HUMAN BEINGS
IN THE PRIVATE SECTOR**

Trier, 12-13 June 2014

Academy of European Law Trier


Ramin Farinpour – Course Director European Criminal Law

Course credit within the CPD scheme of the Law Society of England & Wales:
10 hours (Reference AJG/TAEL)

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